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THE UNCONSTITUTIONALITY OF CAMPUS BANS ON "RACIST SPEECH:" THE VIEW FROM WITHOUT AND WITHIN

Robert A. Sedler*

I. INTRODUCTION

"Racist speech" is a generic term, which refers primarily to speech that denigrates persons on the basis of their race or ethnic origin, but also includes speech that denigrates on the basis of gender or sexual orientation. Many universities have enacted regulations restricting racist speech in response to a disturbing number of overtly racist incidents on university campuses, as well as hostile incidents directed against women and against gay and lesbian persons. The justification for restricting racist speech on campus is that racist speech by its very nature causes discrete and serious harm to racial minorities, women, gay and lesbian persons, and other victim groups, and so creates an "intimidating hostile, or demeaning environment"\(^1\) that "interfere[s] with an individual's academic efforts, . . . [and] participation in University sponsored extra-curricular activities."\(^2\) Proponents of these bans argue that the universities must restrict racist speech in order to provide equality of educational opportunity for racial minorities and other victim groups.\(^3\)

The prevalence of university racist speech policies and other proposals to sanction racist speech has prompted an enormous amount of academic literature on the subject. It is fair to say that most of the academic commentators advocate some form of restriction on racist speech on the university campus, emphasizing the harm that it causes to racial minorities and other victim groups and what commentators

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2. Id.

contend is the resulting denial of equal educational opportunity. While all of the advocates of campus restrictions on racist speech recognize that such restrictions interfere with freedom of expression, they insist that the value of free expression must be balanced against the harm caused by racist speech and against the equality value of the Fourteenth Amendment.4

Much of the discussion about the First Amendment in this context, like much of the academic commentary about the First Amendment generally, tends to be somewhat theoretical and philosophical. Academic commentators frequently attempt to demonstrate that restrictions on racist speech are not inconsistent with and may actually advance First Amendment values, and therefore, such restrictions should be constitutionally permissible.5 The contrary view—a distinctly minority one—is that campus bans on racist speech will inhibit the discussion of controversial ideas and therefore, are inconsistent with the unfettered freedom of inquiry to which a university should be committed.6

In this article my approach to the question of the constitutionality of campus bans on racist speech is quite different and very narrowly focused. The perspective that I hope to contribute to the debate over campus bans on racist speech is that of the litigating lawyer, operating within the framework of what I call the "law of the First Amendment."7 The law of the First Amendment is that body of concepts, principles, and specific doctrines that has emerged over the years from the Supreme Court's First Amendment decisions. In First Amendment


5. It is contended, for example, that "racist speech" distorts the debate in the "marketplace of ideas," particularly by devaluing the speech of victim groups. Lawrence, supra note 3, at 468-70. It may also be noted that the kind of restrictions they propose are usually stated in terms of general propositions rather than in terms of specific regulations.


cases, it is the law of the First Amendment which controls the result, or at least sets the parameters for the resolution of the question at issue. In this article I will demonstrate that under the law of the First Amendment, virtually any campus ban on racist speech imposed by a public university will be found to be unconstitutional. My purpose in adding the litigation perspective to the academic debate over campus bans on racist speech is in no sense an attempt to trump the debate or make it irrelevant. Quite to the contrary, academic debate over what the First Amendment should mean, and over whether racist speech on campus should be protected under the First Amendment is quite valuable. The exploration of these questions goes to the heart of academic inquiry and is an important function of commentary. It may be that at some time in the future, the views of academic commentators on this very controversial question may reach the Justices on the Supreme Court and will be embodied in the law of the First Amendment, although I think that this is highly unlikely.

My purpose in analyzing campus bans on racist speech under the law of the First Amendment is to make it clear that regardless of whether or not such bans should be constitutionally permissible, the stark reality is that they are not. When they are challenged in court, the court will declare them unconstitutional, just as the court did in Doe v. University of Michigan, and The UMW Post v. Board of Regents of the University of Wisconsin System, the only two campus racist speech cases to come before the courts thus far. It is my hope to persuade public universities to abandon this unconstitutional enterprise, and turn their attention to more productive and effective ways of providing equality of educational opportunity for their students.

As the title indicates, this discussion will proceed from "without

8. The scope of constitutionally permissible regulation of "racist speech" on the campus of a public university is so limited that any ban that would be able to withstand constitutional challenge would have no more than symbolic significance, and would not stop "racist speech" at all.

9. Although it may be "heresay" to say so, I do not think that the Supreme Court pays very much attention to "grand theories" posited by academic commentators or to their proposals for "sweeping changes" in constitutional interpretation. In fact, I do not think that it pays much attention to their views at all. See Robert A. Sedler, Book Review, 8 CONST. COMMENTARY 265, 268-69 (1991).

10. We are speaking, of course, only of bans imposed by public universities, where the Constitution comes into play. As to proposals to extend constitutional requirements to private universities, see Henry J. Hyde & George M. Fishman, The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy, 37 WAYNE L. REV. 1469 (1991).


and within"—from the dual perspectives of an academic commentator and of a lawyer who was lead counsel for the ACLU in the challenge to the University of Michigan's racist speech policy. I have approached legal questions in this manner previously, and believe that such an approach has much to commend it. To the extent that the impartial and dispassionate perspective of a pure legal scholar is a virtue, this perspective is admittedly lacking. However, participation as an advocate yields insights that detached scholarly observation can not provide. My involvement in Doe v. University of Michigan has provided special insights for me, and they form a very important part of this article.

Part II presents the controversy over racist speech on campus. This involves an understanding and acknowledgement of the harm to individuals and to the educational environment that commentators have identified as being caused by racist speech and the other reasons why universities may be imposing campus bans on it today. I will also discuss the University of Michigan's policy and how that policy operated in practice. Part III details the law of the First Amendment as it applies to restrictions on racist speech. In Part IV, from a constitutional standpoint the most important part of the article, I will discuss the constitutionality of campus bans on racist speech under the law of the First Amendment. Here I will present the components of the law of the First Amendment that are applicable to determine the constitutionality of campus bans on racist speech and that were dispositive in the Doe and UWM Post cases. I will also explain why virtually any campus ban on racist speech imposed by a public university will be found unconstitutional. In Part V, I will discuss the actions that public universi-


14. On the other hand, it would not appear that this kind of perspective is found in most of the academic writings on "racist speech." Most of the authors are quite "passionate" in their advocacy of restrictions on "racist speech."

15. There was also extensive discovery in Doe, which produced the "legislative history" leading up to the adoption of the policy and all of the cases in which complaints of a violation of the policy were filed. The complaints of violation and their disposition by the university officials administering the policy can serve as an "empirical study" of how a "racist speech" policy has operated in practice. I will discuss the results of this "empirical study" to some extent in this writing to demonstrate the impact that a ban on "racist speech" can have on the free expression of ideas on a university campus.

16. See infra notes 64-97 and accompanying text.
ties can and should take to protect the rights of racial minorities and other victim groups, to ensure that all students enjoy equality of educational opportunity on the university campus.

II. THE CONTROVERSY OVER RACIST SPEECH ON CAMPUS

The primary effort to restrict racist speech in American society is taking place on university campuses today. Campus bans have been enacted in response to a disturbing number of overtly racist incidents on university campuses, as well as hostile incidents directed against women and against gay and lesbian persons. Most of the recent overtly racist incidents have been directed against black-American students at traditionally all-white universities, to which blacks are now being admitted in more than token numbers.\(^17\) Notions of racial supremacy, which unfortunately still lurk just below the surface in the thinking of many Americans, become legitimatized in the minds of some white students when black students are admitted under “affirmative action” programs with lower “paper credentials” than white students who are denied admission.\(^18\) A white student thus can legitimatize an underlying racist belief in terms of purported opposition to affirmative action. White students with racist beliefs apparently feel less restrained today in openly expressing them through degrading “racial epithets.” Because of an increase in reported incidents, universities often feel a strong need to provide a degree of protection for their minority students.

There is also increased sensitivity on university campuses, as elsewhere, to claims of verbal and physical sexual harassment against women, which sometimes involve “date rape.” The concept of sexual harassment has been expanded, perhaps in light of the concerns raised

\(^{17}\) For some examples of these incidents, see Lawrence, \textit{supra} note 3, at 431-34.

\(^{18}\) One of the most enduring consequences of the long and tragic history of racial discrimination in this Nation is an enormous educational gap between blacks as a group and whites as a group. See Robert A. Sedler, \textit{The Constitution, Racial Preference, and the Equal Participation Objective, in Slavery and Its Consequences: The Constitution, Equality and Race} 123, 125 n.18 (Robert Goldwin & Art Kaufman eds., 1988) [hereinafter Sedler, \textit{The Constitution}]. Because of this enormous “educational gap,” the determination of admission to a university primarily on the basis of “comparative objective academic indicators,” such as grades and test scores, ordinarily will result in the admission of few, if any, blacks. See Robert A. Sedler, \textit{Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California}, 17 \textit{Santa Clara L. Rev.} 329, 349-55 (1977). It is only by affirmatively taking race into account in the admission process and admitting black students with significantly lower “comparative objective academic indicators” than white students that the traditionally all-white universities can hope to enroll more than token numbers of black students. The same educational gap exists for hispanic students, and the same need for “affirmative action” applies to them.
by aggressive sexual behavior by men, to include not only the traditional forms of sexual harassment—unwanted sexual touching, persistent demands for a sexual relationship, "obscene phone calls"—but also to the expressed view of women as sexual objects, and the dissemination of pornography and other materials depicting the sexual subordination of women. This expanded notion of sexual harassment has led to a willingness on the part of universities to protect female students from being subjected to "sexual speech" in a variety of circumstances.

Homosexuals are a third group targeted by those who engage in racist speech. The societal hostility toward persons of same-sex orientation, particularly male homosexuals, which the Supreme Court itself has recognized and to an extent legitimized,\(^{19}\) is readily expressed by some male college students as they try to establish their own male identity. As a result, incidents of "gay-bashing" which occur on college campuses, as well as in the larger society, sometimes involve physical violence. Most academics and university administrators, however, unlike the larger society, are sensitive to the needs of individuals living non-traditional lifestyles, and want to protect gay and lesbian students from hostility directed against them by other students because of their different sexual orientation.

The primary and most frequently articulated justification for restricting racist speech on campus is that it causes discrete and serious harm to racial minorities and other victim groups, and as a result denies them equality of educational opportunity.\(^{20}\) As Professor Matsuda has put it: "The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."\(^{21}\) Racist speech is also said to promote the "ideology of racial supremacy"\(^{22}\) and is a "mechanism[] for keeping selected victim groups in subordinated positions."\(^{23}\) When the racist speech takes the form of an insult directed against a particular person, it can "inflict injury by

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22. *Id.* at 2332.
23. *Id.*
[its] very utterance" and can cause that person to doubt her or his self-worth as a human being.

Some academics further contend that on the university campus, racist speech causes harm both to the interchange of ideas and to the educational environment by: injecting "irrationality" into the interchange; silencing minority students and other victim groups due to the visceral shock and preemptive effect of racist words on further speech; and devaluing the speech of minorities and other victim groups. Finally, it is said that racist speech can interfere with a university's educational mission, insofar as that mission includes promoting diversity and teaching respect for human dignity and individual self-worth.

It cannot be denied that racist speech may cause discrete and serious harm to racial minorities, other victim groups and to the educational environment. It may be assumed that campus bans on racist speech are motivated by a genuine concern for the personal and educational welfare of racial minorities, women, gay and lesbian persons, and other victim groups, and for the educational environment on the university campus. However, these reasons for restricting racist speech interact with another phenomenon that goes beyond the personal and educational welfare of the students who suffer harm from the effects of racist speech.

This phenomenon is the growing emergence of a new secular orthodoxy on the campuses of many American universities today. The existence of this secular orthodoxy is at the heart of the debate over "politically correct thinking," or "P.C." Many faculty members and administrators today are products of the sixties, and are trying to implement on the campus the values that came to the fore in the sixties: values of racial equality, gender equality, and respect for individual differences and alternative life styles. Other aspects of this secular orthodoxy are that homosexuality is a morally acceptable and legitimate lifestyle, that the tenets of feminism are superior to the traditional view of women, and that male-oriented sexuality is a form of discrimination against women.

While the proponents of these values in the university community

25. Id. at 136-37.
26. See Post, supra note 20, at 275.
27. Id. at 275-77.
deny that they are trying to impose politically correct thinking on stu-
dents and colleagues, there is clearly the danger that the efforts to im-
plement these values in the academic setting will give rise to a new
officially-imposed secular orthodoxy, in which ideas that are seemingly
inconsistent with these values are deemed to be illegitimate. One such
illegitimate idea, for example, is that there are biological differences
among racial groups which contribute to cognitive and other differences
among the races. A related idea is that biological differences between
men and women cause men and women to behave differently in some
respects, so that men are biologically more suited to perform certain
kinds of tasks while women are biologically more suited to perform
other kinds of tasks.

Universities' efforts to restrict racist speech, while legitimately mo-
tivated by a genuine concern for the personal and educational welfare
of minority students and other victim groups, may also reflect the new
secular orthodoxy that is emerging in much of the university world to-
day. Just as the universities in the 1950's and the 1960's all too often
tried to establish a political orthodoxy by restricting the expression of
controversial political ideas and prohibiting "anti-establishment" politi-
cal activity, today we see the universities trying to implement a new
secular orthodoxy, one component of which is the imposition of restric-
tions on racist speech. 28

28. In the late 1960's and early 1970's, while on the law faculty of the University of Ken-
tucky, I was much involved with the "New Left," as I defended young men in draft resistance
cases and students and others engaged in anti-war protest activity. In reviewing THOMAS I.
EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), I drew on that involvement to suggest that
the "New Left," like the "Establishment" then in power, would not hesitate to suppress ideas with
which it disagreed:

While the present social-economic-political system has brought to power persons whose
values are likely to be wealth-oriented and essentially conservative, I do not think that the
attitude toward dissent and social change would necessarily be different if a "peaceful
revolution" were to take place and the reins of power were transferred to those whose
values are socialistic and radical. . . . In short, if the dissent and social change objective is
to be protected, it is necessary to take account of the attitudes toward dissent and social
change on the part of those administering the legal system, and those attitudes cannot be
expected to be favorable no matter what the social-economic-political complexion of the
society may be. While my "input" in this regard comes from observing the system as ad-
ministered by the "Establishment right," I am willing to assume—and believe I must if my
goal is to maximize the freedom to dissent and work for social change—that the same
problem will exist if the system is administered by an "Establishment left."

Robert A. Sedler, The First Amendment in Theory and Practice, 80 YALE L.J. 1070, 1082 (1971)
(reviewing THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)).

And in regard to the "younger" "New Left" people, who are well-represented among univer-
sity faculty members and administrators today, I made the following observation:
This is exactly what happened with respect to the operation of the University of Michigan's racist speech policy invalidated in *Doe v. University of Michigan*.

I will concentrate on demonstrating three salient points that have emerged from the "empirical study" of the operation of one university's racist speech policy.

The first and most significant point is that the University's policy was directed against the expression of *racist ideas* and was intended by those who administered it to implement a new secular orthodoxy on the university campus. That this was the thrust of the policy and the intention of those administering it is demonstrated both by the "interpretive guide" that was issued by the University and by the way that the policy was administered in practice.

The guide "purported to be an authoritative interpretation of the Policy and provided [fourteen] examples of sanctionable conduct." The plaintiff contended that, "[e]very single example prohibit[ed] acts of expression or association that are absolutely or in all but very limited circumstances protected by the First Amendment." The following example, which was the basis for the plaintiff's standing in *Doe*, and which was a major point of reference for the overbreadth challenge, clearly illustrates how the policy was directed against the expression of racist ideas and was intended to impose a secular orthodoxy on the

My own discussions with younger "New Left" people—and I should add that politically I consider myself a part of the "New Left"—about freedom of expression have caused me some dismay, particularly when they make arguments such as "certain kinds of expression (support of the Vietnam War) are so immoral that they cannot be tolerated," and "repression by definition exists only in a capitalistic system," so that the imprisoning of "counterrevolutionary" writers in the Soviet Union does not constitute repression.

The new officially-imposed secular orthodoxy on some university campuses today indicates just how prophetic these observations have turned out to be.

29. In the planning stage of the present article, I had intended to discuss in detail the substance of the University's racist speech policy and how it operated in practice. In the interim, however, there have been a number of other discussions of this matter, see, e.g., Joseph D. Grano, *Free Speech v. the University of Michigan*, ACADEMIC QUESTIONS, Spring 1990, at 7; Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 187, 194-196, 211-14 (1991), including my own, Robert A. Sedler, *Doe v. University of Michigan and Campus Bans on "Racist Speech": The View from Within*, 37 WAYNE L. REV. 1325, 1331-36 (1991), so I will not belabor the present writing with another detailed discussion.

30. The "interpretive guide," was issued after concerns were expressed by the Board of Regents about the vagueness of the terms of the policy. A copy of the policy and the guide were sent by mail to all registered students in the University for the 1988-89 academic year.


33. *See infra* note 99.
campus: "[a] male student makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates." This example would serve to implement that aspect of the secular orthodoxy which maintains that the tenets of feminism are superior to the traditional view of women, specifically that aspect which maintains that there are no biological differences between the sexes which would make members of each sex biologically more suited than the other to engage in particular kinds of activity. Under the policy, as this example indicates, whenever a male student expressed an idea that was contrary to these aspects of the secular orthodoxy, he would be deemed to have created "a hostile learning atmosphere for female classmates." Even more telling in regard to the advancement of the secular or-

34. Affirmative Action Office, University of Mich., What Students Should Know About Discriminatory Harassment [hereinafter Guide] (booklet distributed to students concurrently with the University's promulgation of Policy).

35. Id. That ensuring conformity to the secular orthodoxy was at least one purpose of the Policy is further illustrated by the comments in the guide on classroom discussion. "What about classroom discussion? The University encourages open and vigorous intellectual discussion in the classroom. To reach this goal students must be free to participate in class discussion without feeling harassed or intimidated by others' comments." Id.

To say the least, these comments turn freedom of academic inquiry on its head. Freedom of speech and inquiry is restricted if the expression of certain ideas would be perceived as "harassing or injuring others." And students must refrain from making comments that could cause other students to feel "harassed or intimidated." Students must thus "learn the secular orthodoxy" so that they will not be accused of making "harassing or intimidating" comments.

Another example, directed against the expression of offensive ideas, was: "[y]ou comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs." Id. The number of viewpoints that would be prescribed under this example is simply staggering. As the plaintiff stated in his affidavit:

Rather than encourage her maturing students to question each other's beliefs on such diverse and controversial issues such as the proper role of women in society, the merits of particular religions, or the moral propriety of homosexuality, the University has decided that it must protect its students from what it considers to be "unenlightened" ideas. Affidavit of John Doe in Support of Plaintiff's Motion for Preliminary Injunction, at 8-9, Doe (No. 89-CV-71683-DT).

Still another example was: "[Y]ou display a confederate flag on the door of your room in the residence hall," id. notwithstanding that the expression of ideas by means of a display of a flag has been considered protected by the First Amendment ever since Stromberg v. California, 283 U.S. 359 (1931). Four other examples involved offensive jokes: "[Y]ou tell jokes about gay men and lesbians;" "[y]ou laugh at and joke about someone in your class who stutters;" "[y]our student organization sponsors entertainment that includes a comedian who slurs Hispanics;" "[m]ale students leave pornographic pictures and jokes on the desk of a female graduate student." Affidavit of John Doe in support of Plaintiff's Motion for Preliminary Injunction, at 8-9, Doe (No. 89-CV-71683-DT). Offensive jokes and parody are fully protected by the First Amendment, regardless of their outrageousness or the real injury they may cause to a person's feelings. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
thodoxy and the impact of the policy on the expression of ideas was the matter of how the policy was administered in practice. Through discovery, we obtained all of the cases in which complaints of a violation of the policy were filed. The district court relied on three of the cases involving expression in the classroom in support of its conclusion that, "as applied by the University over the past year, the Policy was consistently applied to reach protected speech." I will use two of these cases to illustrate how the policy was applied to implement the prevailing secular orthodoxy with respect to homosexuality.

In one of the cases, a graduate student in Social Work (who we later discovered was black) was charged with harassment on the basis of sexual orientation in that he had "repeatedly said that homosexuality is an illness that needs to be cured," and that he had "developed a model to change gay men and lesbians to a heterosexual orientation." He also had discussed efforts to apply this model in his field placement. The student contested the charge, and the case went to a formal hearing. A divided hearing panel held that the student's discussion of "ho-

36. As we had requested, all the names of the complaining and offending students were deleted from the files. After sifting through the cases, and discarding the large number of obscene phone call complaints and most of the cases where no action was taken, we settled on 20 representative cases, and submitted them with a summary of each case and the complete file as an exhibit. See Plaintiff's Exhibit submitted in Support of Motion for Preliminary Injunction, Doe (No. 89-CV-71683-DT) [hereinafter Exhibit].

In UWM Post v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991) where the court invalidated the University of Wisconsin's "racist speech" ban, the court discussed nine cases where students at various campuses in the University of Wisconsin System had been sanctioned under the ban. Except for the fact that these cases did not involve classroom discussion (classroom discussion was specifically exempted from the ban), the cases bear a striking similarity to the University of Michigan cases, and we will refer to some of them in the discussion following.

37. 721 F. Supp. at 865. This was in response to the university's argument that "the Policy did not apply to speech that is protected by the First Amendment," and its urging the court "to disregard the Guide as 'inaccurate' and look instead to 'the manner in which the Policy has been interpreted and applied by those charged with its enforcement.'" Id. at 864-65. As the district court went on to say:

The manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy. . . . There is no evidence in the record that the Administrator ever declined to pursue a complaint through attempted mediation because the alleged harassing conduct was protected by the First Amendment. . . . The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.

Id. at 866.

38. Exhibit, supra note 36, at 5-6.

39. Id. at 6.

40. This was the only case that went to a formal hearing. The hearing panel was to consist
mosexuality as an illness" did not violate the policy. However, the panel stated gratuitously that the finding should not be constructed as "condoning the actions or statements of [the student]," and that what he was accused of doing "should be reviewed by the appropriate social work professionals in considering [the student's] suitability as a professional social worker."

In a second case, in a business school class a student read a limerick which poked fun at alleged homosexual acts of a well-known athlete. After class, another student, apparently gay, read him the policy and accused him of having engaged in intimidating behavior. Although the offending student immediately apologized, the offended student filed a complaint. The offending student agreed to an informal resolution, under which he published a letter of apology in the campus newspaper and agreed to attend a "Gay Rap" session. As these two cases demonstrate, the policy was perceived by the officials administering it and the students filing complaints under it as embodying the prevailing secular orthodoxy, here that aspect pertaining to homosexuality.

Another series of cases involved enforcement of the prevailing secular orthodoxy with respect to sexual harassment and attitudes about sexuality. In one of them a male student had put up a poster "depicting a monster attacking a woman sexually," and a caption reading, "[d]ate rape is not rape." The charge was that the poster constituted

of four students and a tenured faculty member.

41. Id.

42. Id. The case is discussed at 721 F. Supp. at 865. The student was also found guilty of sexual harassment against particular women, a charge that was clearly supported by the evidence.

43. Id. at 7.

44. Exhibit, supra note 36, at 7. The case is discussed at 721 F. Supp. at 865.

The third case involved statements made by a white dental student at the orientation session of a preclinical dentistry class. The was widely regarded as one of the most difficult for second year dentistry students. In the orientation session, where the class was broken up into small groups, the student stated that "he had heard that minorities have a difficult time in the course and that he had heard that they were not treated fairly." Exhibit, supra note 36, at 5. The faculty member teaching the course, herself a minority person, filed a complaint on the ground that the comment was unfair and hurt her chances for tenure. The student was then counseled about the existence of the policy, and he agreed to write a letter apologizing for making the statement without adequately verifying the allegation, which he said he had heard from his roommate, a black former dentistry student. 721 F. Supp. at 865.

45. In another case where a complaint was filed, but no action was indicated in the file, presumably because the identity of the offending student or students was not known, the charge was that students had put up a poster announcing an "End of Art Fair" party, which used the word "fag" several times. Exhibit, supra note 36, at 2.

46. Id. at 4.
sexual harassment against "female residents of 76 corridor square." The student entered into a "behavior contract" with the resident advisor and the building director, under which he agreed among other things to "refrain from placing any offensive or harassing materials on his door, . . . [to] attend a Sexual Assault Prevention program at a specified time [and to] write no less than a two page analysis of the presentation . . . ." In another, a student had posted signs in a residence hall advertising for a roommate. The sign "was headed 'SEX.' and referred to an 'active Co-Ed hall with many lean and hungry women.'" The charge was that "the sign constituted sexual harassment against 'any female resident, staff member, or visitor.'" The student was given a verbal reprimand by a member of the Housing Staff. Again, these examples indicate that the policy was perceived by the officials administering it and the students filing complaints under it as embodying that aspect of the secular orthodoxy dealing with sexual harassment and sexuality.

The second point that has emerged from the "empirical study" reflected in the Doe litigation is that the university officials were using a form of "mind control" to enforce the policy: they required offending students to write humiliating letters of apology, to undergo "re-education" and "sensitivity training," and to enter into "behavior contracts." In the case of the business student whose limerick offended a gay classmate, the University required the student to publish a letter of apology in the campus newspaper and to attend a Gay Rap session.

47. Id.
48. Id.
49. Exhibit, supra note 36, at 4. Another student sent a female student a computer message in which he described an apparently fictionalized case of date rape. The complaint only requested that the Administrator send the student the letter. The Administrator informed the student that his action was in violation of the policy and that "his message 'reflects an insensitive and dangerous attitude toward date rape, which is a serious and significant problem on this campus and in our society.'" Id. at 7.
50. Id. at 3-4.
51. Id. at 4.
52. Id. at 4. Other cases of this nature where complaints were filed, but where no action was indicated in the file, presumably because the identity of the offending student or students was not known, included the following: (1) "[a] student distributed a flyer headed, '25 Good Reasons Why Beer is Better Than Women,'" which contained mostly sexual references, id. at 6; (2) a note was placed on the door of a female student's room saying "Q. How many men does it take to mop a floor? A. None, it's a woman's job," id. at 8; (3) "[a] student posted a "Myth of the Month" poster on a residence hall bulletin board [and] [i]he 'fact' in [it] was that, 'In certain situations, women ask for rape,'" id. at 8; (4) "[m]agazine pictures of nude women were posted over the stalls in the men's bathroom, id.
53. See generally id. at 1-9.
The University required the student who put up the "Date rape is not rape" poster to enter into a behavior contract and attend a Sexual Assault Prevention program. 54

A third case involved a black law student, who during the course of an argument with a white law student in the Law Building, "used the term 'white trash' and said, '[i]t would be in your best interest not to be indignant to me or four o'clock will be more than quitting time.'" 55 The black student complied with the white student's demand for a letter of apology. The letter of apology was very humiliating and could not help but adversely affect the black student's self-esteem—the very thing that a racist speech policy is supposedly designed to prevent. 56 In another case, where a guest in a student's dormitory room was overheard making the remark, "Its just a nigger fighting," the conduct of the guest was "imputed" to the student, and the accused student agreed to attend a seminar or workshop on "diversity." 57 As stated in the plaintiff's brief in Doe, this kind of activity on the part of the university officials administering the policy was "something that might more appropriately be found at the University of Beijing than on the campus of one of America's great universities." 58

The third point that emerges from experience with the operation
of the University of Michigan's racist speech policy is that contrary to popular belief, racist speech is not a matter of straight white males versus minorities, women, gays and other victim groups. Complaints were filed against black students for racist and homophobic speech. A complaint was filed against a white student for asserting that a minority faculty member had discriminated against blacks. A number of the complaints were filed by women students on the ground that male students, sometimes unidentified, had put up posters or pictures of a sexual nature. Other complaints were on the basis of overheard remarks that were not addressed to the complainant. In short, it was everybody complaining about everybody else about everything.

As the above discussion makes clear, the policy was intended to advance a new secular orthodoxy and was administered in such a way as to reach any form of expression that was deemed to be offensive or to run counter to the prevailing secular orthodoxy. Proponents of campus bans on racist speech insist that there is no inconsistency between such bans and the function of a university as a place for free and unfettered inquiry and expression. The empirical study of how one major university's campus ban on racist speech was administered and operated in practice raises some concern about this contention.

Academic commentators tend to dismiss Doe v. University of Michigan as a case involving no more than one university's poorly drafted racist speech policy. In arguing for more carefully drafted campus speech bans, they imply that such bans would not have the same kind of impact on the free expression of ideas as did the University of Michigan's policy. Although I think that the way that the University of Michigan administered its policy is symptomatic of the way that most universities would administer such a policy, this is largely beside the point. It is my submission that campus bans on racist speech, no matter how narrowly-framed and no matter how justified,

59. See supra note 44.

60. See, e.g., Lawrence, supra note 3, at 477-78 n.161; Smolla, supra note 4, at 208 ("the University failed to confine sufficiently its definition of covered speech").

61. This is demonstrated by the way in which the University of Wisconsin ban, which was more narrowly crafted than the University of Michigan ban, had been administered in practice. We have previously given some examples of that administration. A particularly egregious interference with the expression of ideas under the Wisconsin ban was the disciplining of a student for angrily saying to an Asian-American student: "Its people like you—that's the reason this country is screwed up," and that, "[w]hites are always getting screwed by minorities and some day the Whites will take over." UMW Post v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1167 (E.D. Wis. 1991).
are directed primarily against the expression of racist ideas. Since, as I will demonstrate in the next section of the article, a public university cannot for any reason prohibit the expression of racist ideas on campus, virtually any campus ban on racist speech will be found to violate the First Amendment.

III. THE LAW OF THE FIRST AMENDMENT AND CAMPUS BANS ON RACIST SPEECH

The Law of the First Amendment

As stated at the outset, this article discusses the constitutionality of bans on racist speech on campus from the perspective of the litigating lawyer and with reference to what I have called the law of the First Amendment. It is this law that is applicable in actual First Amendment litigation. It consists in large part of concepts, principles and specific doctrines that the Court has developed over the years in the process of deciding First Amendment cases. These concepts, principles and specific doctrines are supplemented by a residually applicable balancing approach, which to a degree consists of a number of subsidiary doctrines. In the context of actual litigation, First Amendment analysis is very much a matter of identification and application. In many cases, once the Court identifies the appropriate concept, principle or specific doctrine, the parameters for the resolution of the constitutional question at issue have been established and the result is often fairly clear.

The point to be emphasized in this regard is that the result in litigation is controlled by the Court’s application of the law of the First Amendment and not by a general “balancing” approach or by some “theory” about the meaning of the First Amendment. It is sometimes said that when governmental regulation is directed at the non-communicative impact of expression, as opposed to the specific message or viewpoint expressed, the Court follows an ad hoc balancing approach: balancing the interest in freedom of expression against other societal interests as these interests appear in the context of particular limitations on expression. However, as an explanation of how First Amend-

62. My thesis with respect to the “law of the First Amendment” is developed fully in Law of the First Amendment, supra note 7. In the present writing, I will reference that article frequently, but will try to avoid needless repetition.

63. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). As Professor Tribe puts it: “the ‘balance’ between the values of freedom of expression and government’s regulatory interest is struck on a case-by-case basis, guided by whatever unifying principles may be articulated.” Id. at 792.
ment analysis operates in litigation, the balancing approach explanation, even as to regulation directed at the non-communicative impact of expression, is somewhat misleading.

Often the result in a First Amendment case is controlled by the application of the appropriate concept, principle or specific doctrine. When this is so, no balancing takes place at all, and the application of the concept, principle or specific doctrine either renders the particular limitation on expression unconstitutional or at least sets the parameters for the resolution of the constitutional question. Moreover, even when there is no controlling concept, principle or specific doctrine, the Court's application of the residual balancing approach is qualified by the Court's precedents dealing with a particular kind of restriction or interference with expression. To this extent, the Court is applying "subsidiary doctrine" to determine the constitutionality of the particular restriction or interference in issue rather than engaging in a general balancing approach.

The constitutionality of campus bans on racist speech then will be determined with reference to the law of the First Amendment. The courts will not engage in some general balancing—balancing the harm caused to the victims by racist speech against the resulting interference with freedom of expression, or balancing the "equality value" of the Fourteenth Amendment against the "freedom of expression value" of the First Amendment. Rather, they will be applying the law of the First Amendment.

Any significant campus ban on racist speech will conflict with three very important First Amendment principles: content neutrality, the protection of offensive speech, and the heightened protection of expression in the academic context, and will therefore invariably be held unconstitutional. This was the fate of the very broad University of Michigan ban in Doe v. University of Michigan, and of the much narrower University of Wisconsin ban in the UWM Post case.

Since I have discussed these principles at length elsewhere, I will only summarize that discussion here, and I will then discuss the application of these principles in the Doe and UWM cases. Under the princi-

64. See Law of the First Amendment, supra note 7, at 460-61. In this regard, it may be noted that the Court's application of a general "balancing" approach over the years has resulted in some specific doctrines that reflect "balancing" considerations, such as the "clear and present danger" doctrine, the "commercial speech" doctrine, and the "symbolic speech" doctrine. These doctrines now control where applicable and make any further balancing in a particular case unnecessary.

65. See id. at 461, 481-83.
ple of content neutrality, the government may not proscribe any expression because of its content, and an otherwise valid regulation violates the First Amendment if it differentiates between expression based on content. 66 Analytically, there are two aspects to the principle of content neutrality: viewpoint neutrality and categorical neutrality. Under the viewpoint neutrality aspect of the principle, to which the Court has never recognized any exceptions, the government cannot regulate expression in such a way as to favor one viewpoint over another. The requirement of viewpoint neutrality was the basis for the Court’s invalidation of state and federal bans on flag desecration. 67 The majority took the position that the asserted governmental interest in preserving the flag as a “symbol of nationhood and national unity” 68 violated this requirement, emphasizing that the government had authorized burning as a proper means of disposing of a torn or soiled flag, so that the thrust of the ban was directed toward the content of the message conveyed by the burning. 69

The requirement of viewpoint neutrality also resulted in the invalidation of a District of Columbia law that prohibited the display of any sign within 500 feet of a foreign embassy that would “tend[] to bring a foreign government into public odium or public disrepute. . . .” 70 The law by its terms only prohibited displays that were critical of the foreign government; displays that were favorable to the foreign government were not prohibited. The law in effect ordained an officially approved viewpoint about the foreign government whose embassy was being picketed. 71 Likewise, the requirement of viewpoint neutrality was violated by a federal law that allowed the wearing of U.S. military uniforms in a portrayal only if the portrayal does not “‘tend to discredit’ the military.” 72 Still another example of the application of this aspect of the principle of content neutrality is found in the invalidation

66. Id. at 466.
68. Eichman, 110 S. Ct. at 2407; Johnson, 491 U.S. at 420.
69. Eichman, 110 S. Ct. at 2409; Johnson, 491 U.S. at 410-418. The dissenting Justices, by contrast, took the position that the defendant’s flag burning in these cases did not involve the expression of ideas, and that it was the “use of this particular symbol and not the idea that he sought to convey by it” which was being prescribed. Johnson, 491 U.S. at 432. Thus, in their view, the laws did not implicate the principle of viewpoint neutrality. Johnson, 491 U.S. at 432-33, 438-39.
71. Id.
of the civil rights anti-pornography law that defined proscribed pornography as the "graphic sexually explicit subordination of women." The law was invalidated because it favored one view of the role of men and women in sexual encounters—equality between men and women—over another—the sexual subordination of women by men.

Under the second aspect of the principle of content neutrality, categorical neutrality, the government generally cannot regulate in such a way as to differentiate between categories of expression. Recently, the Court strongly affirmed this aspect of the principle when it struck down New York's "Son of Sam" law, because that law only applied to a criminal's proceeds from "storytelling" about the crime and not to other assets.

As the above demonstrates, the principle of content neutrality is a very powerful one, and if it applies to a challenge of a particular re-

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74. Id. As the Seventh Circuit stated:
Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.
Id. at 328.
75. Under this aspect of the principle, the Court has invalidated a variety of laws distinguishing between categories of expression. See the discussion and review of cases in Law of the First Amendment, supra note 7, at 468-70.

The requirement of category neutrality is built into the doctrine applicable to governmental licensing of expression, in that the licensing criteria cannot distinguish between categories of expression. So, a "parade permit" law not only cannot distinguish between viewpoints, but also cannot distinguish between parades based on the subject matter of the parade. If a city allows an organization to sponsor a Thanksgiving Day parade, for example, it cannot refuse to allow another organization to have a rally protesting abortion.

The Court has recognized two limited exceptions to the requirement of category neutrality in governmental regulation, both involving the regulation of particular lower level speech. In order to deal with the secondary consequences resulting from the concentration of businesses purveying sexually explicit materials, a city can enact zoning regulations requiring such businesses to spread out. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). And because commercial speech receives less constitutional protection than non-commercial speech, a billboard regulation does not violate the First Amendment when it exempts some billboards from the regulation, although it does violate the First Amendment when it exempts some non-commercial billboards from the regulation. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).
striction of expression, it controls the outcome of that challenge.\textsuperscript{77} The First Amendment, as the Court has said, requires "equality of status in the field of ideas,"\textsuperscript{78} and the principle of content neutrality is the doctrinal vehicle by which such "equality of status" is achieved.

The second applicable First Amendment principle, \textit{protection of offensive speech}, forecloses any justification for a restriction on expression on the ground that the expression is offensive. As the Supreme Court stated in \textit{Johnson v. Texas} when striking down the Texas flag desecration laws: "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."\textsuperscript{79} Nor may the government prohibit the expression of an idea in a particular manner that is highly offensive, such as by the use of an "unseemly expletive."\textsuperscript{80} Under this principle the government cannot prohibit the expression of an idea on the ground that the idea itself or the manner in which the idea is expressed is highly offensive to many people. Therefore, any time the government tries to justify a restriction on expression on the ground of its "offensiveness," the justification is necessarily improper.

The third principle, \textit{heightened protection of expression in the academic context}, emerged from the constitutional challenges of governmental efforts in the fifties and sixties to impose a political orthodoxy on university campuses and in the public schools. As the Court in a number of cases invalidated loyalty oath requirements for public employees and legislative inquiries into the beliefs and associations of teachers, it emphasized the importance of free inquiry in the academic context. For example, as Justice Brennan stated in \textit{Keyishian v. Board of Regents}:

\begin{quote}
\textsuperscript{77} Recall that the question that divided the Court in the flag desecration cases was the application of the principle to the challenged restrictions in question. Where the terms of a flag desecration law expressly violate the principle of content neutrality, such as a law prohibiting "casting contempt" on the flag, the law clearly is unconstitutional. See \textit{Smith v. Goguen}, 415 U.S. 566 (1974).

\textsuperscript{78} Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

\textsuperscript{79} Texas v. Johnson, 491 U.S. 397, 414 (1989). In that case, the Court refused to recognize an exception to this principle "even where our flag has been involved." \textit{Id}. The principle of protection of offensive speech even applies to commercial speech. Thus the government cannot prohibit product advertising, such as an advertisement for contraceptives, on the ground that such advertising would be offensive to many persons. \textit{Bolger v. Youngs Drug Prods. Corp.}, 463 U.S. 60 (1983).

\textsuperscript{80} Cohen v. California, 403 U.S. 15, 23 (1971) (public display of jacket with the message, "Fuck the Draft").
\end{quote}
Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."81 The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."82

It is on the basis of this kind of language in the Court's opinions and its actions in protecting freedom of academic inquiry against governmental interference that we can find a principle of heightened protection of expression in the academic context.

This principle was also involved in cases arising in the late sixties and early seventies when public universities tried to restrict "anti-establishment" speech and association on campus. In *Healy v. James* 83 the Court held that a public university could not refuse to grant official recognition to a student group, here the local chapter of the Students for a Democratic Society, because of disagreement with the group's philosophy or because of an unsubstantiated fear that the group would be a "disruptive influence."84 The Court also held that a public university could not constitutionally expel a student for distributing on campus a newspaper which contained a cartoon "depicting policemen raping the Statue of Liberty and the Goddess of Justice,"85 and an article

81. The concept of the "marketplace of ideas" was long ago expressed by Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.


The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

83. 408 U.S. 169 (1972).

84. The Court, citing *Keyishian*, observed that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Id.* at 180-81.

85. *Id.* at 667-68.
with the headline, "'M____ f____ Acquitted,' which discussed the trial and acquittal of a New York City youth who was a member of an organization know as 'Up Against the Wall, M____ f____.'" 86

In the context of campus bans on racist speech, these First Amendment principles interact with each other, and operate in conjunction with the void on its face doctrine. The void on its face doctrine, which is extremely important in actual First Amendment litigation, is one of those doctrines that is derived from the fundamental First Amendment concept of chilling effect. 87 Under this doctrine, a law regulating or applicable to expression may be challenged on its face for substantial overbreadth or vagueness. 88 The doctrine is extremely powerful in practice, not only because the challenged law can be invalidated without regard to whether the activity of the party challenging it is constitutionally protected, 89 but also because the constitutional analysis does not go beyond the terms of the law itself. Moreover, once a law is invalidated on its face, it is as if the law literally has been excised from the statute books: it cannot be enforced against any person in any circumstances. 90

In practice, however, the void on its face doctrine, while perhaps

86. Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973). The university's justification that the expulsion was necessary to uphold its interest in maintaining "conventions of decency" on campus was summarily rejected, the Court observing that, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" Id. at 670. As this discussion indicates, for this reason the expulsion also violated the principle of protection of offensive speech. And the university's attempt to justify its action as a reasonable time, place and manner limitation foundered on the principle of content neutrality, since the undisputed facts showed that the student was "expelled because of the disapproved content of the newspaper rather than the time, place or manner of its distribution." Id. at 670 (alteration in original).

87. See the discussion of the "chilling effect" concept in Law of the First Amendment, supra note 7, at 462-64.

88. Analytically, a law is overbroad when it includes within its terms constitutionally protected expression, and is vague when the terms are such that it could reasonably be construed to include within its prohibitions constitutionally protected expression. A law can be overbroad without being vague, such as a law prohibiting all peaceful picketing. Thornhill v. Alabama, 310 U.S. 88 (1940). Usually, however, overbreadth and vagueness merge, and the Court has stated that it has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983). In practice, the challenge ordinarily is that the law on its face, is substantially vague and overbroad, in violation of the First Amendment.


90. As Justice White, who is no great fan of the void on its face doctrine, has stated, it is "strong medicine" and should be applied "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).
applied "sparingly and only as a last resort" to laws that have as their primary purpose the regulation of conduct and have only an incidental effect on expression, is readily applied to invalidate laws that by their terms are directed against expressive activity. Thus, in Houston v. Hill, the Court invalidated on its face a Houston ordinance making it unlawful for a person to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty."

In the context of campus bans on racist speech then, the principles of content neutrality, protection of offensive speech, and heightened protection of expression in the academic context interact with each other, and in conjunction with the void on its face doctrine operate to impose an insuperable constitutional obstacle to a public university's efforts to ban racist speech on campus.

IV. THE UNCONSTITUTIONALITY OF THE UNIVERSITY OF MICHIGAN AND UNIVERSITY OF WISCONSIN BANS

In Doe v. University of Michigan, there could be no serious question that the University of Michigan's racist speech policy was uncon-
96. Because Doe was an affirmative challenge to the university's ban on "racist speech," it was necessary to find a plaintiff with standing to bring the challenge. In actual constitutional litigation, "justiciability" issues, such as standing, are often more crucial than the issues going to substantive constitutionality. In Doe, I had no doubt that if we could surmount the standing hurdle, the university's "racist speech" policy would be declared void on its face. I do not think that the very capable lawyer retained by the University to defend the case had any doubt on this score either. I anticipated that the University's main line of defense would be on the question of standing, as it was, and so I delayed bringing the suit until we could recruit a plaintiff who would present the strongest case for standing under the Court's current and very restrictive standing doctrine. Under that doctrine, in order to have standing, the plaintiff must allege (and prove if controverted) facts sufficient to show "that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation, 454 U.S. 464, 472 (1982) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

In a First Amendment case, the "chilling effect" concept that is so important in the substantive "law of the First Amendment" is also relevant to establish the standing of the named plaintiff to bring an affirmative challenge. It could be argued that any student at the University had standing to challenge the policy because the existence and threatened enforcement of the policy created a "chilling effect" on the expression of ideas at the University and so directly impacted the university environment of which the student is a part. That is, the policy changed the University environment from one in which inquiry was "free and unfettered" to one in which there was an "officially-imposed orthodoxy." This adverse impact on the university environment is felt by all students at the University, and so all students would have standing to challenge the policy that produced the change in the university environment. This argument, focusing on an injury to intangible interests that is widely shared by a large number of persons, is based on Sierra Club v. Morton, 405 U.S. 727 (1972) (users of a national park would have standing to challenge changes in the environment of the park as a result of a proposed resort development), was made as a "back-up" argument to support standing in Doe. Brief in Support of Plaintiff's Motion for Preliminary Injunction, at 5-6, Doe (No. 89-CV-71683-DT). However, I was reluctant to make this kind of injury in fact the sole basis for our standing claim, and because we had a plaintiff with "stronger" standing, the court found it unnecessary to consider it. 721 F. Supp. at 861 n.9.

The "stronger" standing claim was based on the specific "chilling effect" on the exercise of First Amendment rights by the named plaintiff resulting from the existence and threatened enforcement of the policy. I endeavored to recruit a plaintiff (the ACLU has a First Amendment right to recruit plaintiffs to bring constitutional challenges, In re Primus, 436 U.S. 412 (1978)) who could allege in good faith that he or she refrained from expressing particular ideas in class because of the existence and threatened enforcement of the policy, and I was successful in doing so. The named plaintiff was a graduate student in psychology, whose field of specialty was biopsychology, which he described as the interdisciplinary study of the biological bases of individual differences in personality traits and mental ability. He alleged that certain controversial theories positing biologically-based differences between the sexes and among the races might be perceived as "sexist" and "racist" by some students, and he feared that discussion of such theories might subject him to sanction under the policy. 721 F. Supp. at 858.

That the discussion of such theories could subject him to sanction under the policy was supported by the "[w]omen just aren't as good in this field as men" example in the authoritative guide. See Guide, supra note 34. In his affidavit filed in support of the motion for preliminary injunction, Doe related this example to questions that he wanted to discuss in his capacity as a teaching assistant in a course on comparative animal behavior, but that he would not for fear of sanction under the policy.

The policy by its
terms applied to “educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers.” In these areas, students were subject to discipline for verbal

An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. ... [One] hypothesis regarding sex differences in mental abilities, is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women choose the engineering profession.

Affidavit of John Doe in Support of Plaintiff's Motion for Preliminary Injunction, at 6, Doe (No. 89-CV-7163-DT).

The court found that in light of the example given in the guide, Doe's fear's that he might be charged with a violation of the policy if he discussed such theories “could not be dismissed as speculative and conjectural,” and that, “[t]he ideas discussed in Doe's field of study bear sufficient similarity to ideas denounced as 'harassing' in the Guide to constitute a realistic and specific threat of prosecution.” 721 F. Supp. at 860.

The specific “chilling effect” on the exercise of Doe's First Amendment rights resulting from the existence and threatened enforcement of the University's “racist speech” policy supports what may be called “subject to” standing. Where the expressive activity in which a party wishes to engage is subject to the prohibitions of a law, and the party refrains from engaging in that activity because of the existence of the law and the fear of sanction under it, the resulting “chilling effect” of the party's exercise of First Amendment rights constitutes present injury in fact for standing purposes. For illustrative cases (in which the issue was sometimes discussed in terms of “actual controversy” for declaratory judgment purposes, or “irreparable injury” for injunctive purposes) see Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (bar that had been providing topless dancing for its patrons subject to “bare breasts” ordinance); Steffel v. Thompson, 415 U.S. 452 (1974) (threat by prosecutor to invoke trespass law against handbilling at shopping center); Epperson v. Arkansas, 393 U.S. 97 (1968) (public school teacher subject to state law prohibiting teaching of evolution); National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) (college students holding draft deferments subject to selective service board regulation withdrawing draft deferments for students engaging in “illegal protest activity”).

Outside of the First Amendment area, “subject to” standing exists for any party who refrains from engaging in any action because of the existence of a law and the fear of sanction under it, such as the standing of a physician who refrains from performing abortions to challenge the constitutionality of an anti-abortion law. Doe v. Bolton, 410 U.S. 179 (1973).

In Doe v. University of Mich., the court found that Doe's fear of sanctions under the policy, if he discussed these theories, was credible, not only because of the example in the guide, but because the University had enforced the policy against students “in the classroom and research setting who offended others by discussing ideas deemed controversial,” and because “the policy was enforced so broadly and indiscriminately that plaintiff's fears of prosecution were entirely reasonable.” 721 F. Supp. at 861.

97. Its official title was the University of Michigan Policy on Discrimination and Discriminatory Harassment.

98. The policy also appeared to apply in practice to University housing, although by its terms it did not. The policy states that, “persons should not be required to tolerate discriminatory behavior in their homes,” but goes on to say that “discriminatory conduct” in University housing was governed by the terms of the leases. University of Michigan, University of Michigan Policy on Discrimination and Discriminatory Harassment [hereinafter Policy] (preamble). Although we used examples of complaints filed in the University housing setting, the named plaintiff did not reside in University housing, and the focus of our challenge was on the impact of the policy in the academic setting. The district court took the position that the constitutionality of the policy as it
behavior that "(1) . . . stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that (2) . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities." The policy was unconstitutional because its underlying premises were inconsistent with the principles of content neutrality, protection of offensive speech, and heightened protection of expression in the academic context. The policy, reflecting the university's efforts to impose a secular orthodoxy on campus, was directed against the expression of racist ideas, and so violated the principle of content neutrality. Likewise, the harm that the prohibited expression purportedly caused to victim groups was due to the perceived offensiveness of the expression, and related to "verbal conduct and verbal behavior" in University housing was not put in issue by the complaint. Substantially the same language was included in the sexual harassment provision. That provision defined sexual harassment as "[s]exual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation." Policy, supra, at note 98. While the litigation was pending, and after the District Court had set a hearing on the plaintiff's motion for a preliminary injunction, the University, without notice to the plaintiff, announced that it was withdrawing the "[c]reates an intimidating, hostile or demeaning environment," part of the policy as applied to "educational and academic centers." This withdraw obviously had no effect on the plaintiff's constitutional challenge, since the University could reinstate the withdrawn portion of the policy in the future. The court was still required to and did determine the facial validity of the policy as if the suspended provision had remained in effect. Cf. City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982); United States v. W.T. Grant Co., 345 U.S. 629 (1953).

99. There was no challenge to the policy insofar as it prohibited physical behavior.

100. Substantially the same language was included in the sexual harassment provision. That provision defined sexual harassment as "[s]exual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation." Policy, supra note 98. While the litigation was pending, and after the District Court had set a hearing on the plaintiff's motion for a preliminary injunction, the University, without notice to the plaintiff, announced that it was withdrawing the "[c]reates an intimidating, hostile or demeaning environment," part of the policy as applied to "educational and academic centers." This withdraw obviously had no effect on the plaintiff's constitutional challenge, since the University could reinstate the withdrawn portion of the policy in the future. The court was still required to and did determine the facial validity of the policy as if the suspended provision had remained in effect. Cf. City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982); United States v. W.T. Grant Co., 345 U.S. 629 (1953).

101. As we stated in our brief, using the "women aren't as good in this field as men," example: "As the plaintiff has demonstrated in his Affidavit, under the Policy the University has established a 'secular orthodoxy,' an element of which, illustrated by the above example, is that 'the tenets of feminism are superior to the traditional view of women.' Under the principle of content neutrality, the government may not 'ordain a preferred viewpoint about women' . . . Nor may it prescribe the expression of any idea because of the content of that idea or the message it conveys, in the name of creating a 'non-hostile' environment for students."
the prohibition of the expression on that basis violated the principle of protection of offensive speech. Finally, these restrictions on the expression of racist ideas were imposed by a public university on its students, thus violating the principle of heightened protection of expression in the academic context.

The district court, in its opinion, discussed the interaction of these First Amendment principles in determining that the university's policy was void on its face for overbreadth, because, by its terms, it reached "broad categories of speech, a substantial amount of which is constitutionally protected." As we stated in our brief, again using the "women just aren't as good as men" example, it may well be that female students at the University of Michigan would be offended by the expression of the idea that, "[w]omen just aren't as good in this field as men," or that, "women are more suited than men to care for children," and would find the expression of such ideas to create a 'hostile learning atmosphere'. . . . [T]he University may not prohibit the expression of any idea, no matter how offensive the idea of the form in which it is expressed may be to other students. Nor may the University say that a particular idea is so offensive as to create an 'intimidating, hostile or demeaning environment for educational pursuits.'" Id. at 13-14 (alteration in original).

As we argued in our brief: "The third fundamental First Amendment principle that is literally trashed by the University's Policy is the principle of heightened protection of expression in the academic context. . . . As the plaintiff has stated in his Affidavit, the University, in the name of creating a 'non-hostile environment for students,' has established a 'secular orthodoxy.' The First Amendment, however, precludes the University from casting a pall of [secular] orthodoxy over the classroom." Id. at 14-15.

The University argued that in practice, the policy did not apply to "speech that is protected by the First Amendment," and "urged the court to disregard the Guide as 'inaccurate' and look instead to 'the manner in which the Policy has been interpreted and applied by those charged with its enforcement.'" Id. at 864-65. The court, looking especially to the incidents in which the policy was applied to the classroom discussion and remarks, concluded that, "as applied by the University over the past year, the Policy was consistently applied to reach protected speech." Id. at 865.

The court also found that the terms of the policy were unconstitutionally vague. The policy violated "the Due Process Clause, because it did not give fair notice as to what activity was prohibited by the policy, and also violated the First Amendment, because it "never articulated any principled way to distinguish sanctionable from protected speech."" Id. at 867. The court noted that the policy referred both to causative language and to the effects of that language on victim groups. The causative language part contained terms such as "stigmatize" and "victimize," which, as the court stated, "are general and elude precise definition." Id. Moreover, the fact that a statement may "victimize" or "stigmatize" does not deprive it of "protection under the accepted First Amendment tests." Id. The "effects" part referred to "interfering with an individual's academic efforts," which "gives no inherent guidance." In addition, once the interpretive guide was withdrawn as "inaccurate," there was an "implicit admission that even the university itself was unsure of the precise scope and meaning of the Policy." Id.

The courts do not always sharply distinguish between First Amendment vagueness and due process vagueness, and often as here, both kinds of vagueness will be present in the same law or governmental action. Analytically, the difference is that First Amendment vagueness is premised on a concern for preventing a "chilling effect" on the exercise of First Amendment rights by the existence and threatened enforcement of a vague law, while due process vagueness is premised on
What the University could not do, however, was establish... an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed... Nor could the University proscribe speech simply because it was found to be offensive, even, gravely so, by large numbers of people... These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission... With these general rules in mind, the Court can now consider whether the Policy sweeps within its scope speech which is otherwise protected by the First Amendment.108

The court enjoined the University from enforcing its racist speech policy,106 and the University did not appeal.107 There could be no serious question that under the law of the First Amendment the University's policy was void on its face, and even the strongest proponents of bans on racist speech on campus do not contend otherwise.108

It is important, however, to understand precisely why the University's racist speech policy was void on its face. The policy was not void on its face, because it was poorly drafted. Rather it was void on its face because, as the district court stated, it reached a substantial amount of constitutionally protected speech. And it reached a substantial amount of constitutionally protected speech, because it was directed against the expression of racist ideas. It is for this reason that virtually any campus ban on racist speech imposed by a public university will be found unconstitutional under the law of the First Amendment.

Any campus ban on racist speech, no matter how "limited" and no matter how purportedly "narrowly drawn," is at its core directed against the expression of racist ideas, and will necessarily have the effect of sanctioning the expression of racist ideas in the particular circumstances to which it applies.

The underlying justification for restricting racist speech on campus is that racist speech by its very nature causes discrete and serious harm...
to racial minorities and other victim groups, and so deprives them of equal educational opportunity. But the harm that is purportedly caused by racist speech is due to the racist nature of the idea that is being conveyed and to the impact of that idea on racial minorities and other victim groups. No matter how limited the circumstances in which the ban on racist speech applies, it is still the idea itself and the impact of the idea on the victim that is the justification for the restriction. What Doe v. University of Michigan makes clear is that under the law of the First Amendment, a public university cannot prohibit the expression of racist ideas in any circumstance and for any purpose. It can not do so, because a campus ban on the expression of racist ideas violates the important First Amendment principles of content neutrality, the protection of offensive speech, and heightened protection to freedom of expression in the academic context. So long as the ban reaches the expression of racist ideas, as it invariably will, the ban will be found unconstitutional.

This proposition is clearly demonstrated by UWM Post,109 in which the district court invalidated the University of Wisconsin’s racist speech policy.110 Compared to the University of Michigan’s ban, the University of Wisconsin’s ban was decidedly narrow. It applied only to: intentional “comments, epithets or other expressive behavior” that were racist or discriminatory, “directed at an individual,” “[d]emean[ed] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual” addressed, and that “[c]reate[ed] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”111 It specifically excluded from its coverage comments made during class discussion.112 According to the lawyer who was the principal drafter of the ban, “compliance with the [F]irst [A]mendment became the focus of the regulatory effort,”113 and “what emerged was a narrow rule based principally on the [F]irst [A]mendment ‘fighting words’ doc-


110. The University of Wisconsin is a multi-campus system, and the policy applied to all campuses in the system.

111. 774 F. Supp. at 1165-66.

112. Id. Like the University of Michigan, the University of Wisconsin issued an authoritative guide to students. One example of a non-violation was the same kind of “men are better in this field than women” statement in class that was listed as a violation in the University of Michigan’s authoritative guide. Id. at 1167.

trine, and incorporating equal opportunity concepts that prohibit demeaning expressive behavior that creates a hostile environment for minorities." 114 In commenting on this ban prior to the decision, I observed that: "it still has overbreadth and vagueness problems, due to the use of the 'intimidating, hostile or demeaning environment' concept, and due to the fact that, whether intended or not, it still reaches the expression of 'racist ideas,' albeit on a one-to-one basis." 115

The court in UWM Post, like the court in Doe v. University of Michigan, invalidated the ban on its face for overbreadth. 116 The court's primary focus was on the fact that the ban violated the principle of content neutrality. The University advanced the oft-repeated justification that the ban was necessary to prevent the harmful effects of racist speech on racial minorities and other victim groups and to provide these students with equal educational opportunity. 117 The problem with this justification, however, as the court made clear in the same manner as did the court in Doe, is that in order to do so, the ban prohibited the expression of racist ideas, and therefore, regulated speech because of its content. As the court stated:

> It is clear, however, that the UW Rule regulates speech based on its content. The rule disciplines students whose comments, epithets or other expressive behavior demeans their addressees' race, sex, religion, etc. . . . However, the rule leaves unregulated comments, epithets and other expressive behavior which affirms or does not address an individual's race, sex, religion, etc. 118

In response to the University's argument that the court should balance the "minimum social value" of racist speech against the harm that it caused to minority students and other victim groups and to the educational environment, the court replied that a balancing approach was appropriate only with respect to content-neutral speech regulation. 119

As pointed out previously, when a First Amendment principle such as content neutrality is applicable, no balancing takes place, and the application of the First Amendment principle controls the result. Stated simply, as UWM Post makes clear, a public university cannot

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114. Id.
115. Sedler, supra note 29, at 1343 n.54.
116. The court also found impermissible vagueness due to ambiguity in that the rule was unclear on the question of whether the speaker "must actually create a hostile educational environment or if he must merely intend to do so." UMW Post, 774 F. Supp. at 1179.
117. Id. at 1176-77.
118. Id. at 1174.
119. Id. at 1173.
protect minority students and other members of victim groups from the harmful effects of racist speech by prohibiting the expression of racist ideas in any circumstances. It can not do so because any prohibition on the expression of racist ideas, no matter what the circumstances, violates the principle of content neutrality.  

_UWM Post_ makes it clear then that narrow bans on racist speech, such as those that are limited to "direct, face-to-face racial insults" and "targeted vilification," as proposed by Professor Charles Lawrence, also violate the First Amendment. Lawrence has analogized face-to-face racial insults to "fighting words:")

> [t]he Supreme Court has held that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected. . . . Face-to-face racial insults, like fighting words, are undeserving of first amendment protection for two reasons. The first reason is the immediacy of the injurious impact of racial insults . . . . The second reason . . . relates to the underlying purpose of the first amendment. If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults deserve that purpose . . . . [B]ecause the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim.

While face-to-face racial insults, unlike fighting words, will not provoke a violent response with a resulting breach of the peace, Professor Lawrence argues that this should not matter, since "the preemptive effect

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120. The court went on, however, to find that even under the balancing test proposed by the University, the ban would still be unconstitutional. Here, the court emphasized that contrary to the University's assertion, "racist speech" was indeed intended to inform the listeners of the speaker's "racist or discriminatory views," id. at 1175, and in effect invoking the principle of protection of offensive speech, noted that, "the speech the rule prohibits would be protected for its expression of the speaker's emotions," id. In response to the University's contention that the ban was necessary to promote diversity by increasing the representation of minority students, the court noted that: "However, the UW Rule does as much to hurt diversity on Wisconsin campuses as it does to help it. By establishing content-based restrictions on speech, the rule limits the diversity of ideas among students and thereby prevents the 'robust exchange of ideas' which intellectually diverse campuses provide." _Id_. at 1176.

121. Lawrence, _supra_ note 3, at 437. Lawrence argues that the First Amendment permits "narrowly drafted provisions aimed at racist speech that results in direct, immediate and substantial injury." _Id_. These would include both face-to-face racial insults and "racial epithets and vilification that do not involve face-to-face encounters—situations in which the victim is a captive audience and the injury is experienced by all members of a racial group who are forced to hear or see these words because the insulting words are aimed at the entire group." _Id_.

122. _Id_. at 451-52 (citing _Chaplinsky v. New Hampshire_, 315 U.S. 568, 572 (1942), the only case where the Supreme Court has ever found that expression constituted fighting words). The operative holding of _Chaplinsky_, however, did not relate to the "psychic harm" caused by the "fighting words," but to their tendency to "incite an immediate breach of the peace." _See_ Strossen, _supra_ note 6, at 508.
on further speech is just as complete as with fighting words." Thus he contends they should be treated as the "functional equivalent" of fighting words and so should not be protected by the First Amendment.

The functional equivalent of fighting words argument has been advanced by Professor Lawrence and others, in misplaced reliance on language contained in Chaplinsky v. New Hampshire, the case in which the Court promulgated the fighting words exception to the First Amendment, and the only case incidentally in which the Court ever applied that exception to uphold the constitutionality of a ban on expression. The Court in Chaplinsky defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The operative holding in Chaplinsky, however, did not relate to the "psychic harm" caused by the fighting words, but to their tendency to "incite an immediate breach of the peace."

This, of course, was exactly the premise of the University of Wisconsin ban which was invalidated in the UWM Post case. The University there made the identical arguments that have been advanced by Professor Lawrence. The University attempted to analogize its ban on targeted racist speech to a ban on fighting words, arguing in effect, as does Lawrence, that racist speech is the functional equivalent of fighting words. This attempt failed for the simple reason that the ban was not limited to fighting words, and while the First Amendment does not protect fighting words, it does protect what Lawrence calls the functional equivalent of them.

When the University tried to bring its racist speech ban within the fighting words exception, the court noted that in Chaplinsky the Supreme Court did set out a two-part definition for fighting words: (1) words which by their very utterance inflict injury, and (2) words which by their very utterance tend to incite an immediate breach of the peace.

123. Lawrence, supra note 3, at 452.
124. Id. at 453-54. Professor Lawrence then makes the point that "the fighting words doctrine is a paradigm based on a white male point of view," id. at 454, because it "presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults," id. at 453-54. Racial minority persons will not make a violent response to "fighting words," because they "correctly perceive that a violent response to fighting words will result in a risk to their own life and limb." Id. at 454.
126. 315 U.S. 568, 572 (1942).
127. 315 U.S. at 572.
128. See Strossen, supra note 6, at 508-09.
The court noted that "[t]he two parts of the fighting words definition correspond to different concerns regarding reactions to offensive expressions." The first half "relates to the prevention of psychological injury, primarily in the form of emotional upset and injury to the 'sensibilities' of addressees." The second half "addresses the prevention of physical retaliation likely to cause a breach of the peace."

However, the court went on to say that in *Chaplinsky*, the state supreme court "applied only the second half [of the definition]." The state law in issue had been construed by the state supreme court as reaching only language which tends to incite an immediate breach of the peace, and the Supreme Court held that the law, as limited in its scope by the state supreme court, did not violate the First Amendment. The *UWM Post* court then pointed out that in subsequent decisions the Supreme Court "has limited the fighting words definition so that it now only includes . . . [the] second half [of the definition]." Thus, the fighting words exception applies to words which by their very utterance tend to incite an immediate breach of the peace—what we have referred to as a one-to-one invitation to a fight. Since the University of Wisconsin ban did not require that the regulated speech, by its very utterance, have a tendency to incite violent reaction, it went "beyond the present scope of the fighting words doctrine," and "cover[ed] a substantial number of situations where no breach of the peace is likely to result. . . ." This being so, the ban failed to meet the requirements of the fighting words doctrine, and so was void on its face for overbreadth.

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130. *Id.* at 1169.
131. *Id.*
132. *Id.* at 1169-70.
133. *Id.* at 1170.
134. *Id.*
135. *Id.* The court cited two Supreme Court overbreadth decisions, *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Lewis v. New Orleans*, 415 U.S. 130 (1974), and the Court's recent reference in *Texas v. Johnson*, 491 U.S. 397, 409 (1991), to that "small class of 'fighting words' that are 'likely to provoke the average person to retaliation and thereby cause a breach of the peace.'" *Id.* at 1170-71.
137. *Id.* at 1172-73.
138. *Id.* at 1173. Professor Lawrence has used as a model of permissible regulation of "face-to-face racial insults" the "harassment by vilification" provision of the Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment, adopted by Stanford University June 1990. Harassment by vilification is defined as speech or other expression intended to
Fighting words are not constitutionally protected, because they are an invitation to a fight rather than the expression of an idea, and so amount to an illegal verbal act for First Amendment purposes. But the expression of racist ideas on a one-to-one basis is protected by the First Amendment in the same manner as the expression of any other idea on a one-to-one basis, notwithstanding the fact that racist ideas are intended to "stigmatize" the person to whom they are addressed and may cause discrete and serious harm to that person. In short, for First Amendment purposes, there is no such thing as the functional equivalent of fighting words. Unless the particular expression comes within the extremely narrow definition of fighting words—a one-to-one invitation to a fight—it is a protected expression for First Amendment purposes and can not be proscribed because of its content. This is true regardless of the harmful impact that it may have on the recipient.

As Doe v. University of Michigan and the UWM Post case make clear, any campus ban on racist speech, no matter how purportedly limited, that reaches the expression of racist ideas violates the First Amendment. Under the principle of content neutrality, a public university cannot ban the expression of racist ideas in any circumstance or for any purpose. It is also completely irrelevant, from a constitutional standpoint, that the expression of racist ideas may cause serious and discrete harm to racial minorities and other victim groups. To say that the harm caused by the expression of racist ideas is constitutionally irrelevant is not to deny or demean the significance of such harm.

139. See infra notes 161-65 and accompanying text (discussing "verbal acts"). As to the limitation of the "fighting words" exception to a one-to-one invitation to a fight, see Strossen, supra note 6, at 508-09; Tribe, supra note 65, at 929 n.9. As Professor Strossen puts it, "Under the Court's current view, even facially valid laws that restrict fighting words may be applied constitutionally only in circumstances where their utterance almost certainly will lead to immediate violence." Strossen, supra' note 6, at 509. This point is supported by the Court's definition of "fighting words" in Texas v. Johnson, where it referred to that "small class of 'fighting words' that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace." 491 U.S. 397, 409 (1989) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

140. It will be recalled that in Doe v. University of Michigan, the term, "stigmatize," was held to be impermissibly vague. 721 F. Supp. 852, 866-67.
Rather it is to recognize that the fact that expression causes psychic or emotional harm to persons can not be an independent justification for restricting it. The components that comprise the law of the First Amendment do not take account of the psychic or emotional harm to persons that may result from acts of expression. Where such harm does result, it is the price, so to speak, that the victims of the harm must pay for the larger good that is deemed to be advanced by the high degree of protection to freedom of expression that is provided by the First Amendment.

141. This proposition is clearly illustrated by Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), where the Court held that the rule of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), imposing the stringent requirement of knowing falsity or reckless disregard for truth, applied in a tort action for the intentional infliction of emotional distress brought by a "public figure." There a well-known religious leader claimed to have suffered severe emotional distress as a result of a crude parody in a sexually-oriented publication, accusing him of having committed incest with his mother. He argued that: "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false." Hustler Magazine, 485 U.S. at 53. In rejecting this argument, the Court stated that, "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures." Id. Thus, the New York Times rule applied to limit recovery for the intentional infliction of emotional distress, despite the serious and discrete harm that the expression caused to the victim. Again, the existence of this harm was completely irrelevant to the operation of this specific doctrine of the "law of the First Amendment."

Similarly, in the recent case of Simon & Schuster, Inc. v. Members of N.Y. Crime Control Bd., 112 S. Ct. 501 (1991), where the Court applied the principle of content neutrality to invalidate New York's "Son of Sam" law, the Court noted that the state did not, "assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization." Id. at 509.

142. For a comprehensive discussion of the Court's unwillingness to deny First Amendment protection to expression that causes persons to suffer emotional harm, see David Goldberger, Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech, 56 BROOK. L. REV. 1165 (1991).

It is also completely irrelevant, under the "law of the First Amendment," that "racist speech" is purportedly inconsistent with the equality value of the Fourteenth Amendment. As a constitutional matter, "racist speech" does not involve any tension between the Fourteenth Amendment's equality guarantee and the First Amendment's guarantee of freedom of expression. The Fourteenth Amendment prohibits the state from engaging in invidious racial discrimination; the First Amendment prohibits the state from abridging freedom of expression. These guarantees do not conflict in the sense that one cannot be asserted to justify what would otherwise be a violation of the other. For example, the Fourteenth Amendment's Equal Protection Clause prohibits the states from operating racially-segregated public schools, and the states cannot justify racial segregation in the public schools on the ground that whites should have a freedom of association right not to associate with blacks in public facilities. See Robert A. Sedler, The Constitution and School Segregation: An Inquiry into the Nature of the Substantive Right, 68 KY. L.J. 879, 939-40 (1979-80). By the same token, the First Amendment principles of content neutrality, protection of offensive speech, and heightened protection to freedom of expression in the academic context prohibit a
Another type of purportedly narrow limitation on racist speech that has been proposed by Professor Lawrence is the protection of the captive audience. Professor Lawrence has argued that a public university should be able to restrict "racial epithets and vilification . . . [where] the victim is a captive audience and the injury is experienced by all members of a racial group who are forced to hear or see these words [because] the insulting words, in effect, are aimed at the entire group." In support of this position, he states that, "the regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener's home or when the unwilling listener cannot avoid the speech."  

Professor Lawrence relies on *Kovacs v. Cooper,* where the Court upheld a ban on loud and raucous amplifiers on city streets (which presumably would prevent the use of most soundtrucks), and two cases directly involving the privacy of the home, *FCC v. Pacifica Foundation,* and *Rowan v. United States Post Office Department.* In *Pacifica Foundation* the Court held that the FCC could restrict the broadcasting of "offensive language" over the radio in the middle of the day. In *Rowan* the Court upheld a federal law that enabled an unwilling recipient of advertisements for sexually explicit material to prevent them from coming into the home. As regards speech invading the privacy of the home, Professor Lawrence could have added *Frisby v. Schultz,* where the Court upheld an ordinance prohibiting "focused picketing" directed against a person in front of the person's home.

With respect to the law of the First Amendment, all of these cases essentially involve the specific doctrine of reasonable, time, place and manner regulation: a reasonable and content neutral regulation of expression in terms of time, place and manner is not an abridgment of speech under the First Amendment. The most "reasonable" regula-
tion of expression is one that enables an unwilling listener to avoid speech in the privacy of the home. As the court stated in *Frisby v. Schultz*:

[1]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. . . . One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. . . . Individuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom.150

There would be no constitutional problem, therefore, with a university regulation that enabled a student to exclude unwanted speech, racist or otherwise, from her or his dormitory room. Such a regulation could authorize a student to put up a notice stating, "post nothing on the door to my room and put nothing under the door." This would be a content-neutral place regulation, designed to protect the student from unwanted speech in the privacy of the student's dormitory room.

Professor Lawrence, however, while invoking the privacy of the home principle, dramatically departs from that principle and would impose restrictions directed at protecting students from racist speech in common living spaces and even over the entire campus. He states as follows:

Racist posters, flyers, and graffiti in dorms, classrooms, bathrooms, and other common living spaces would fall within the reasoning of these cases. Minority students should not be required to remain in their rooms to avoid racial assault. Minimally, they should find a safe haven in their dorms and other common rooms that are a part of their daily routine. I would argue that the university's responsibility for ensuring these students received an equal educational opportunity provides a compelling justification for regulations that ensure them safe passage in all common areas. A black, latino, Asian or Native American student should not have to risk being the target of racially assaulting speech every time she chooses to walk across campus.151

The premise here apparently is that minority and other victim group students are a captive audience on the university campus and so must be protected against racially assaulting speech.152

Professor Lawrence does not define precisely what he means by "racially assaulting speech," but presumably his definition goes beyond

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150. 487 U.S. at 484 (citations omitted).
152. *Id.* at 457.
racial epithets and includes the targeted expression of racist ideas. I am assuming that he would find a poster on a white student's dormitory room door saying, "Blacks are inferior and don't belong at this university," to be racially assaulting speech just as he would a poster containing the same message, but substituting "niggers" for "blacks." If I am correct in this assumption, as I think I am, then it is the content of the message and its offensiveness to the victim that makes it racially assaulting speech under Professor Lawrence's view, regardless of whether or not the message uses racial epithets.

Thus, the ban on racially assaulting speech contravenes the First Amendment principles of content neutrality and the protection of offensive speech, and when imposed by a public university, the principle of heightened protection of expression in the academic context. As we have emphasized, because of these important First Amendment principles, a public university cannot protect minority students from unwanted exposure to racist ideas. This is no less true when the students are in common rooms or going across the campus than it is when they are in the classroom. To contend that because the government can enable persons to exclude unwanted speech from the privacy of their homes, a public university can protect its minority students as a captive audience from racist speech on the university campus is a "mis-analogy" that cannot be supported under the law of the First Amendment. A regulation that enables a person to exclude unwanted messages from the home or from a dormitory room can be sustained as a reasonable time, place and manner regulation designed to support an individual's privacy in the home. But a university campus is not a home, and once a student leaves the dormitory room, the university can no longer assert an interest in protecting the privacy of the home. Thus, the doctrine of reasonable (and content-neutral) time, place and manner regulation is no longer applicable, and under the applicable First Amendment principles—content neutrality, protection of offensive speech, and heightened protection of expression in the academic context—a ban on racially assaulting speech on a university campus clearly violates the First Amendment.

The constitutional analysis would be different if a public university merely prohibited the use of racial epithets. Assuming that the university succeeds in defining the proscribed racial epithets with sufficient precision to withstand a vagueness or overbreadth challenge, which, in my opinion, it could only do by specifically proscribing particular racial epithets and kindred words, it could try to justify the restriction as a
reasonable time, place and manner regulation. It would argue that such a restriction is appropriate on a university campus in order to promote civilized discourse and to protect the injury to racial minorities and other victim groups that the use of racial epithets is deemed to cause. And there is certainly no need for any one to express any idea by the use of racial epithets. Under such a restriction, a student could put up a poster saying, "Blacks are inferior and don’t belong at the university," but not a poster substituting the racial epithet "niggers" for "blacks."

It may be noted that proponents of bans on racist speech such as Professor Lawrence, while making copious use of racial epithets to illustrate racially assaultive speech, have never proposed a ban limited only to the use of racial epithets. And in all fairness, such an extremely limited ban would not accomplish their objective of protecting minority students from the harm that they contend results from racist speech. The perceived harm is only marginally less when the message is "blacks are inferior," than it is when the message is, "niggers are inferior." In any event, for present purposes, it is sufficient to note that a ban on the use of racial epithets could possibly be sustained as a reasonable time, place and manner limitation on expression on a university campus.

Especially is this so in the one place on a university campus where racial epithets are not likely to be used at all, the classroom. Today it is difficult to perceive of a situation when even the most racist professor or student would use racial epithets in the classroom. But in the completely hypothetical situation where a professor would use them, it can be contended that this is an act of discrimination directed against minority students: it serves no purpose other than to make them feel inferior and unwanted in the classroom.153 Likewise, if a student would try to use racial epithets, the professor doubtless could prohibit the student from using such language that has no place in the civilized discourse of the classroom.154

Outside of the confines of the classroom, however, a ban on the use of racial epithets becomes more difficult to sustain as a reasonable

153. As to the prohibition of acts of discrimination on the part of faculty members, see infra note 170 and accompanying text.
154. The professor's right to maintain a suitable level of discourse in the classroom would give the professor the right to prohibit the use of unseemly expletives that would otherwise be permissible on the streets or in a public building. Cf. Cohen v. California, 403 U.S. 15 (1971) (court holding that public display of jacket with the message "Fuck the Draft" was protected under the First and Fourteenth Amendments).
time, place and manner limitation. 155 The matter of maintaining an appropriate level of discourse becomes quite diffuse when applied to the university campus as a whole. This is particularly true if the university has made no other effort to prescribe an appropriate level of discourse except for the ban on racial epithets. By singling out racial epithets in this way, the regulation may violate the category neutrality aspect of the content neutrality principle. Moreover, the ban on the use of racial epithets is premised on the offensiveness of this expression, thereby implicating the principle of protection of offensive speech. For these reasons, I think it is highly problematical that a ban on the use of racial epithets, going beyond the classroom and applied to the campus as a whole, could be sustained as a reasonable time, place and manner regulation.

It must be emphasized again that most campus bans on racist speech are by no means limited to racial epithets, and the proponents of such bans do not try to justify them as being nothing more than a reasonable time place and manner limitation. Campus bans on racist speech are directed against the expression of racist ideas, and these bans, no matter how purportedly narrowly-framed or how justified, can not be sustained under the First Amendment because they are inconsistent with the First Amendment principles of content neutrality, protection of offensive speech, and heightened protection of expression in the academic context. For better or for worse, this is the result that obtains in reality. 156

155. Racial epithets addressed to a person on a one-to-one basis could be proscribed if they amount to fighting words, or if they are a part of a course of conduct amounting to the intentional infliction of emotional distress, as will be discussed in the next section of the article.

156. Most of the academic debate over campus bans on "racial speech" and over "racial speech" generally has centered around whether such speech should be protected under the First Amendment. In a perceptive and penetrating article, Professor Mari Matsuda has argued that the Supreme Court should make a categorical exception for "[racial speech]" and hold that it lies outside of the protections of the First Amendment. See Matsuda, supra note 4. Professor Matsuda contends that, "racial speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse." Id. at 2357. She lists three identifying characteristics of "racial speech": (1) The message is of racial inferiority; (2) The message is directed against a historically oppressed group; and (3) The message is persecutorial, hateful and degrading. Id. Professor Matsuda goes on to say:

The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content"/"conduct" distinction. This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neu-
Regardless of what the academic commentators may be saying about campus bans on racist speech, a public university that has imposed such a ban or is considering whether or not to impose one must understand that the ban will invariably be declared unconstitutional when it is challenged in court. The public universities, therefore, may decide that this enterprise is not worth the cost, and instead turn their attention to more meaningful and constitutionally valid ways of providing equality of educational opportunity for all of their students.

V. EQUALITY OF EDUCATIONAL OPPORTUNITY ON THE UNIVERSITY CAMPUS

Public universities have many constitutionally permissible means at their disposal to protect the personal and educational welfare of minority students and other victim groups. Moreover, they can promote a tral, value-laden approach that will better preserve free speech.

As Professor Matsuda clearly recognizes, bans on "racist speech" are directed against the expression of racist ideas, and, it is precisely for this reason, as we have demonstrated, that such bans will be found unconstitutional under the "law of the First Amendment." As the academic debate continues, it is important to define the parameters of the debate, and to have a clear understanding of the difference between views about what the First Amendment should mean and what the First Amendment does mean in the context of actual litigation. Under the "law of the First Amendment," as it now exists, campus bans on "racist speech" imposed by public universities will be found unconstitutional when challenged in court, and the academic debate over restrictions of "racist speech" on campus should take place with full recognition of this very salient reality.

157. In Doe v. University of Michigan, Judge Cohn began his analysis of the constitutional issue with a discussion of the scope of permissible regulation. He first listed all the ways that the legal system provides protection against discrimination and harmful conduct: (1) the Constitution and federal and state laws prohibit discrimination in employment, education, and governmental benefits on the basis of race, sex, ethnicity and religion; (2) Michigan law provides criminal and civil remedies for assault and battery and specifically prohibits assault and property damage for purposes of ethnic intimidation; (3) federal law, 42 U.S.C. §§ 1983, 1985 (1988), and 18 U.S.C. §§ 241-242 (1988), imposes civil and criminal sanctions against persons depriving or conspiring to deprive others of federal constitutional rights; (4) many forms of sexually abusive and harassing conduct are actionable, including abduction, rape, and other forms of criminal sexual conduct; (5) the dissemination of legally obscene materials is a crime under Michigan law; (6) a civil remedy is available for women who are subject to quid pro quo sexual harassment in employment, and both racial minorities and women are protected from a hostile or offensive workplace environment. 721 F. Supp. 852, 861-62. He then noted that, "[t]he First Amendment presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct, over and above any remedies already supplied by state or federal law." Id. at 862.

Judge Cohn then reviewed the categories of speech that were not protected by the First Amendment. These eluded fighting words, as defined in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), noting that under certain circumstances, racial and ethnic epithets, slurs and insults could fall within this description. 721 F. Supp. at 862. They might also be sufficient to state a
equality of educational opportunity in the most meaningful way by making a strong and demonstrable institutional commitment to educational diversity on the university campus.

First and foremost in regard to protecting the personal and educational welfare of minority students and other victim groups is the university's prohibition of all discrimination on the basis of race, gender, sexual orientation, and the like, and the vigorous enforcement of its anti-discrimination policy. In this connection, it should be emphasized that acts of discrimination are not protected by the First Amendment even though they may take the form of words or writing. This is an application of the broader principle that conduct otherwise unlawful, such as perjury, solicitation to crime, misrepresentation, and the like, does not cease to be unlawful merely because it is carried out by means of written or verbal expression. These verbal acts may be proscribed, because they do not implicate freedom of speech within the meaning of the First Amendment. As the Court has stated: "it has never been deemed an abridgment of freedom of speech or press to make a course claim for the common law tort of intentional infliction of emotional distress. So too are credible threats of violence or property damage made with the specific intent to intimidate the victim because of race, sex, religion or national origin are subject to both criminal and civil sanction under Michigan law. Also unprotected is "speech which has the effect of inciting imminent lawless action and which is likely to incite such action," id. at 862-63 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)), and speech that is legally obscene under the test of Miller v. California, 413 U.S. 15 (1973). In addition, the university could subject all speech and conduct to "reasonable and nondiscriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication." Doe, 721 F. Supp. at 863. As he concluded: "If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen." Id. at 863.

158. The verbal acts that are not protected because they are not freedom of speech within the meaning of the First Amendment include the proverbial false cry of fire in a crowded theater. Here the speaker is not trying to convey an idea, but is trying to induce conduct as an automatic response to the statement. This effort to induce conduct, rather than to convey an idea, is a verbal act rather than speech for First Amendment purposes, and since it is a verbal act with harmful consequences, it may be proscribed without regard to the First Amendment. However, when it is the speech itself that is made unlawful—as opposed to speech that is an integral part of unlawful conduct—what is involved is freedom of speech for First Amendment purposes and not an unlawful act. Compare the situation where there is a fire in a crowded theater located in the upper level of a building, and the speaker says: "Disregard the signs saying to take the stairs in case of fire. Let's take the elevator and get out of here before we all are crushed to death on the stairs." Here the speaker is expressing an idea, invoking the listener's cognition and trying to persuade the listener to take certain action. The idea the speaker is expressing may be an unsound idea, but it is an idea rather than a verbal act and so is freedom of speech for First Amendment purposes. Whether the state can sanction the expression of the idea in these circumstances thus requires a First Amendment analysis, and the constitutional permissibility of the state's effort to sanction the expression will be determined under the "law of the First Amendment."
of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language. . . ."\(^{169}\)

That acts of discrimination taking the form of words or writing are not protected by the First Amendment is illustrated by *Pittsburgh Press v. Human Relations Commission*,\(^{160}\) where the Court upheld against First Amendment challenge an order forbidding a newspaper to carry sex-designated help-wanted advertisements. What was being enjoined here was not expression, but an illegal activity, the practicing of sex discrimination by the use of sex-designated help-wanted advertisements. The newspaper would be free, of course, to criticize the prohibition against its carrying sex-designated help-wanted acts—such criticism would involve the expression of an idea—but it could not claim First Amendment protection for its act of illegal sex-discrimination. So too, a verbal or written request for sex by a supervisor, accompanied by an explicit or implicit threat of disadvantageous treatment if the employee refuses, may be found to constitute quid pro quo sexual harassment and thus amount to prohibited discrimination on the basis of sex under federal and state civil rights laws.\(^{181}\)

The relationship between the parties may impose a duty on one of the parties to refrain from engaging in acts of discrimination and to that extent to refrain from "racist speech" in the context of that relationship. So, when an employee of a place of public accommodation addresses derogatory and humiliating racial or ethnic epithets to a customer, that employee has caused the customer to suffer differential treatment on the basis of race or ethnicity—to use the language of Title II of the Civil Rights Act of 1964, the customer has been denied the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race."\(^{162}\) A number of cases in which this kind of activity has occurred have involved claims for tort recovery for the intentional infliction of emotional distress or insult, which the courts have sometimes allowed and sometimes rejected. These cases are more properly treated as discrimination cases, actionable under federal and state anti-discrimina-


\(^{161}\) Some forms of "racist speech" may be prohibited on the ground that they are the vehicle for carrying out prohibited discrimination and so are not freedom of speech within the meaning of the First Amendment.

tion laws, regardless of whether or not the conduct complained of amounts to a common law tort. 163

Likewise, when an employer or a supervisor directs derogatory and humiliating racial, ethnic or sexual epithets to an employee, this may have the effect of creating a hostile working environment, and if it does it amounts to prohibited employment discrimination. Again, because of the employer-employee relationship, the employer or supervisor may be constrained from engaging in activity—which includes addressing epithets to the employee—that have the effect of creating a hostile working environment. Cases involving this type of behavior have sometimes arisen in the context of common law tort claims, and like the public accommodation cases, should be treated as discrimination claims. 164

Professor Love contends that, "[t]he existence of antidiscrimina-

163. See, e.g., Wiggs v. Courshon, 355 F. Supp. 206, 208 (S.D. Fla.), appeal dismissed, 485 F.2d 1281 (1973) (When a black customer complained about a missing item in his food order, the waitress exclaimed, "[y]ou can't talk to me like that, you black son-of-a-bitch . . . I will kill you," and then shouted repeatedly from the kitchen, "they are clothing but a bunch of niggers."); Irving v. J.L. Marsh, Inc., 360 N.E.2d 983, 984 (Ill. App. 1977) (In order to obtain a refund for merchandise returned to defendant's store, a black customer was forced to sign a slip which the salesperson had written, "[a]progrant Nigger refused exchange—says he doesn't like products."); Dawson v. Zayre Dep't Stores, 499 A.2d 648 (Pa. Super. 1985) (In dispute over a lay-away ticket, defendant's sales clerk called customer a "nigger.").

164. One such case is Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (Where in an argument with a black employee, the employer stated, "all you niggers are alike." When the employee walked away, the employer followed him, and continued to call him a "nigger." 583 F. Supp. at 925. When the employee objected to the employer's use of racial epithets and said that he wanted to be treated "like a human being," the employer replied, "[y]ou're not a human being, you're a nigger." Id. The employee left his job and never returned.). Another example is Gomez v. Hug, 645 P.2d 916 (Kan. App. 1982) (A member of the Board of County Commissioners directed ethnic epithets toward Hispanic county employees, including statements such as, "fucking spic," "fucking mexican greaser," "pile of shit," and as a result of which the employee feared that he would lose his job.). Other cases include: Lay v. Roux Laboratories, Inc., 379 So. 2d 451, 452 (Fla. Dist. Ct. App. 1980) (When a black woman employee parked her car in a reserved place in the company parking lot, a white male supervisor threatened her with the loss of her job, and directed "humiliating language, vicious verbal attacks, [and] racial epithets" at her, including calling her a "nigger."); Alcorn v. Ambro Engineering, Inc., 468 P.2d 216, 217 (Cal. 1970) (When black employee, who was a shop steward, told employer that he had told another employee that he should not drive a certain truck to the job site, employer shouted at employee in a rude and insolent manner: "You goddam 'niggers' are not going to tell me about the rules . . . I don't want any 'niggers' working for me . . . I am getting rid of all the 'niggers' . . . you're fired."). For a case where the court held that derogatory ethnic remarks, e.g., "all the other f—ing Jewish broads around here . . . think they are something special and deserve more than the others," directed by an employer to an employee, following which she left her job, amounted to prohibited employment discrimination, see Imperial Diner, Inc. v. State Human Rights Appeal Bd., 417 N.E.2d 525, 527 (1980).

The above example cases are all taken from Jean C. Love, Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress, 47 WASH. & LEE L. REV. 123, 159 (1990).
tion legislation can serve as a basis for the courts to tailor the cause of action for intentional infliction of emotional distress to meet the needs of the victims of discriminatory speech." 165 In commenting on Professor Love's article at a Conference on Offensive and Libelous Speech, held at Washington and Lee Law School, March 31, 1990, I expressed misgivings over Professor Love's use of the concept of "discriminatory speech." Where so-called "discriminatory speech" amounts to a prohibited act of discrimination, as in most of the examples cited in Professor Love's article, the "discriminatory speech" is not protected. But this is only and precisely because the "discriminatory speech" amounts to an act of discrimination, and it is the act of discrimination which is not protected. Discriminatory speech or racist speech that does not amount to an act of discrimination, however, is freedom of speech within the meaning of the First Amendment, and any effort to sanction such a speech is subject to analysis under the law of the First Amendment.

Thus, public universities can and should prohibit all acts of discrimination against minority students and other victim groups. The universities can prohibit discrimination on the part of faculty members, such as a faculty member's application of different grading standards to minority or women students, or refusal to call on them in class, or belittling of them when they do speak. 166 The universities can also prohibit discrimination by university-recognized student organizations, such as racial or religious restrictions on fraternity membership. 167

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165. Love, supra note 164, at 159.
166. As we have discussed previously, see supra notes 156-57 and accompanying text, a ban on the use of racial epithets in the classroom, by either faculty members or students, can be sustained as a reasonable time, place and manner limitation. As we stated there, it is difficult to believe that even the most racist member would use racial epithets in the classroom today. However, it might be possible that a faculty member who is extremely hostile to persons of different sexual orientation could use epithets such as "fag" or "dyke" in referring to such persons. The deliberate use of such epithets by a faculty member would clearly amount to an act of discrimination against gay and lesbian students, and so would not be constitutionally protected. The nature of the relationship between the faculty member and the student imposes certain constraints on the faculty member, and the faculty member cannot use derogatory epithets with the intent to effect disadvantageous treatment of gay and lesbian students.

It should also be noted that the interest in academic freedom protected by the First Amendment is essentially an interest related to freedom of inquiry and the unfettered expression of ideas. A claim of academic freedom could not be relied on to justify discrimination against minority students or women by refusing to call on them in class or by belittling them, nor could it be relied on to justify the use of derogatory epithets. Indeed, the Supreme Court has held that academic freedom cannot be relied on even to shield confidential peer review materials from disclosure in a discriminatory denial of tenure claim. University of Pa. v. Equal Employment Opportunity Comm'n, 493 U.S. 182 (1990).
167. Such a prohibition would not interfere with any freedom of association rights of the
They can prohibit recruiting on campus by employers that engage in discrimination against victim groups, such as banning military recruitment because of the military's discrimination against gay and lesbian persons. The vigorous enforcement of a university's anti-discrimination policy conveys the university's strong commitment to educational equality for all of its students.

When it comes to protecting individual students from harm at the hands of other students, standard university regulations, of course, prohibit: physical attacks, theft, property destruction, and the like. The universities can also prohibit one student from intentionally inflicting emotional distress upon another student. This protective policy should prohibit the intentional infliction of emotional distress for any reason, not merely because of the student's membership in a victim group. A student who is subject to the intentional infliction of emotional distress by another student on the basis of personal dislike, for example, suffers the same kind of emotional harm as a student who is subject to the infliction of emotional distress because of that student's race, gender or sexual orientation. However, the behavior that is the basis of the charge of intentional infliction of emotional distress must be of substantially the same "outrageous" nature that would satisfy the requirements of a civil tort action, and the charge cannot be based on actions that amount to the constitutionally protected expression of ideas. Likewise, the universities can prohibit sexual harassment, in

members of the fraternity, since the fraternity can go off-campus if it wants to continue its discriminatory practices. The university can legitimately insist that all recognized student organizations adhere to the university's non-discrimination policy, and its interest in providing equal opportunities for its minority students to participate in extra-curricular activates is surely "compelling" for constitutional purposes. Cf. New York State Club Ass'n v. New York, 487 U.S. 1 (1988) (New York law prohibiting discrimination based on sex, race or religion by clubs involved in commercial activity is not facially invalid and any possibility of overbreadth is curable through case-by-case analysis).

168. In 1979 Wayne State University took this suggested action. The University of Pittsburgh School of Law took similar action in 1991, however, the prohibition there is limited to a ban on interviewing at the law school facilities.

169. As to the common law tort of the intentional infliction of emotional distress, see the discussion in Goldberger, supra note 142, at 1183-91, 1205-12.

170. In Doe v. University of Michigan, we pointed out that the adoption of the following provision dealing with the intentional infliction of emotional distress would be constitutional: No student shall engage in any action or series of actions directed toward another student or group of students with the specific intention of inflicting emotional distress on such student or group of students or interfering with that student's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety. The verbal or written expression of any idea in any form, unaccompanied by any action or series of actions directed toward another student or group of students, as set forth above, shall not
the sense of unwanted sexual advances, requests for sexual favors, unconsented to physical touching, and the making of "obscene telephone calls" to another student. But it can not, under the law of the First Amendment, define "sexual harassment" in such a way that would protect women students from being subjected to "sexual speech" not otherwise amounting to harassment.

Going beyond the protection of individual students from discrimination or from harmful acts by other students, the universities can best promote equality of educational opportunity for all their students by making a strong and demonstrable institutional commitment to educational diversity on the university campus. The major element of an institutional commitment to educational diversity is the achievement of a truly diverse faculty and student body. This means that the universities must rise above "tokenism" in faculty staffing, and see to it that in all units throughout the university, minority and women faculty members are represented in some reasonable proportion to their representation in the different academic disciplines. Minority and women faculty can serve as a resource for minority and women students, not merely as role models, but as faculty members who can relate on a personal basis to the problems that minority and women students may face on the university campus. Indeed, as regards educational diversity, the presence of a reasonable number of minority and women faculty can improve the quality of a university education for all students—in some respects, most particularly for white males—since minority and women faculty can bring to their teaching and research the perspective that

be violative of this section.

Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction, at 9 n.9, Doe (No. 89-CV-71683-DT).

As to the problems in applying the concept of intentional infliction of emotional distress to verbal harassment alone, see Strossen, supra note 6, at 515-17. Professor Strossen concludes that, "any cause of action for intentional infliction of emotional distress that arises from words must be narrowly framed and strictly applied in order to satisfy first amendment dictates." Id. at 517.

171. Assuming that the definition of obscene phone call follows that contained in federal and state laws prohibiting such behavior, and so does not reach protected expression. The typical obscene phone call probably does not constitute freedom of speech within the First Amendment, in that like the proverbial false cry of fire in a crowded theatre, it is devoid of communicative content and so is not the expression of an idea. See supra note 162.

172. Since university faculties in most fields are predominantly male, it is likely that at least some faculty members are gay, although not all gay faculty members may acknowledge their sexual orientation. Those who do can serve as this kind of resource for gay students. Assuming that the university does not discriminate on the basis of sexual orientation, an increase in the number of women faculty should result in the addition of at least some lesbian faculty members who can serve as this kind of resource for lesbian students.
comes from the experience of being a minority person or a woman in America.\textsuperscript{173} Moreover, they can help their white male colleagues increase their own sensitivity to issues of racial equality, gender equality and the like.

For minority students, the universities' commitment to educational diversity necessarily means a commitment to affirmative action and the increased enrollment of minority students.\textsuperscript{174} Where a university has succeeded in enrolling a "critical mass" of minority students,\textsuperscript{175} minority students are less likely to feel isolated and will no longer be easy targets for hostile white students. There is indeed safety in numbers, and minority students can more effectively respond to racist attacks from whatever source if they are in a position to act collectively. The minority students will feel even more secure when the university has also succeeded in having a reasonable number of minority faculty members. When minority students feel that they belong at the university and that it is their university as well as the university of white students, they are better able to react to and downplay the significance of any racist speech or other racist incidents directed against them.\textsuperscript{176}

\begin{itemize}
\item For a discussion of this "perspective" see Sedler, \textit{The Constitution}, supra note 18, at 128-32.
\item See supra note 18 (discussing the necessity of using affirmative action to enroll a reasonable number of minority students).
\item My experience in litigating school desegregation cases on behalf of black parents and children has convinced me of the crucial importance of critical mass. \textit{See, e.g.,} Newburg Area Council, Inc. v. Board of Educ. of Jefferson County, Ky., 489 F.2d 925 (6th Cir. 1973), vacated and remanded, 418 U.S. 918, appeal after remand, 510 F.2d 1398 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975). In these cases we always insisted that under the desegregation plan, each school have no less than 10% black students, so that the black students would not feel isolated, and the white students would perceive the school as a racially integrated school rather than as a virtually all-white school.
\item In the various presentations I have made on "racist speech on campus" since \textit{Doe v. University of Michigan}, such as at Harvard's Kennedy School of Government in October, 1989, Smith College in March, 1990, and Dickinson Law School in April, 1990, I have compared the situation at the University of Michigan with the situation at Wayne State University, where I teach. The University of Michigan is an "elite" university, with a relatively small percentage of black students, perhaps 5%, and relatively few black faculty members. The presence of these black students is doubtless resented by some white students, who consider the black students to be affirmative action students, admitted with lower "paper credentials" than their own and than those of some of their friends who were not admitted. Because of their small numbers, the black students are more likely to feel isolated and more sensitive to "racist speech" directed against them by white students. Of course, if the University were to admit more black students and hire more black faculty, it might lose some of its "elitism." \textit{See Derrick Bell, And We Are Not Saved} 144 (1987) (where a hypothetical "elite" law school refuses to hire another black faculty member, because it would make the faculty "too black," and the dean patronizingly says to the black faculty member who recruited the candidate: "I don't want to be unkind. We do appreciate..."
\end{itemize}
Finally, the universities can expand their curricula to promote the values of equality and diversity, and to provide their students with increased knowledge about racism, sexism, homophobia and the like in American society and the world. The same First Amendment that precludes a public university from trying to enforce a "secular orthodoxy" by means of campus bans on racist speech also protects "[t]he freedom of a university to make its own judgments as to education," and so permits it to affirmatively promote the values of equality and diversity in its educational program. The universities can and should offer a variety of courses that focus on issues of equality and that include the contributions made by minorities and women to the world in which we live. The universities also can if they wish include some of these courses in their general education requirements.

It is precisely because public universities have at their disposal all these means of protecting the personal and educational welfare of their students that it is utterly unrealistic to think they will adopt banned "racist speech." Wayne State University, where I teach, is certainly not an "elite" university. It is an urban public university located in the inner city of Detroit. It has the largest black student enrollment, over 20%, of any traditional white university (this year's entering law school class, for example, consisted of 42 black and hispanic students, or 18.7% of the total), and is considered by some in the Detroit area to be the "black university." There is also a strong and visible commitment to affirmative action; there are more black faculty than at most traditionally white universities, the deans of liberal arts, social work, nursing and education are black, and blacks are represented in the high reaches of the university administration. Because of the critical mass of black students and the visible commitment of the university to affirmative action, black students at Wayne State have a sense of security and a feeling of belonging. While incidents of "racist speech" doubtless occur at Wayne State, as elsewhere, there has never been any suggestion that Wayne State should adopt a ban on "racist speech." It would be completely unnecessary.


It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. 438 U.S. at 312 (quoting Sweezy, 354 U.S. at 263).

In Bakke, Justice Powell relied on the First Amendment-based right of a public university to select its own student body to find that precisely-tailored race-conscious admissions procedures designed to achieve a racially-diverse student advanced a "compelling governmental interest" and so were constitutionally permissible. See Robert A. Sedler, Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective, 26 WAYNE L. REV. 1227, 1244-48 (1980).
students and of truly achieving equality of educational opportunity for all of their students that they should completely turn away from trying to impose unconstitutional bans on racist speech.

VI. CONCLUSION

This article has demonstrated that virtually any campus ban on racist speech imposed by a public university will be found unconstitutional. These campus bans on racist speech, whether of the very broad type embodied in the University of Michigan's ban or whether of the more narrow "targeted vilification" type advocated by academic commentators such as Professor Lawrence, and embodied in the University of Wisconsin's ban, are directed against the expression of racist ideas due to their purported harmful effect on racial minorities and other victim groups. Because these bans are directed against the expression of racist ideas, they are inconsistent with the First Amendment principles of content neutrality, the protection of offensive speech, and the heightened protection to expression in the academic context. As Doe v. University of Michigan and the UWM Post v. Board of Regents of the University of Wisconsin System make clear, when these bans are challenged in court, they will be held to violate the First Amendment.

There are more positive and constitutionally permissible ways by which a public university can try to achieve equality of educational opportunity for all of its students. While the academic debate over campus bans on racist speech will doubtless continue, it may be that public universities will now decide to turn away from this unconstitutional enterprise and instead direct their efforts toward bringing about a meaningful equality of educational opportunity on campus.

ADDENDUM

While this article was in press and shortly before its publication, the Supreme Court rendered its decision in R.A.V. v. City of St. Paul, Minnesota,178 where the Court unanimously, although in two separate and differing opinions, struck down a St. Paul ordinance banning the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.179 Although serious time constraints prevent an ex-

179. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). The case arose out of a prosecution against a group of teenagers who burned a crudely-made cross on the lawn of a black family that had moved into a previously all-white neighborhood. Instead of prosecuting them only for a tres-
tended analysis of the case and its ramifications, there can be no doubt that the Court's holding makes authoritative the thesis of the present article: "[t]hat under the law of the First Amendment, virtually any campus ban on racist speech imposed by a public university will be found to be unconstitutional." Indeed, in view of the Court's holding, it is now possible to eliminate the use of "virtually" as a qualification.

The Minnesota Supreme Court attempted to give the obviously overbroad ordinance a narrowing construction by limiting it to "fighting words." The concurring opinion of Justice White, joined in this respect by Justices Blackmun, Stevens and O'Connor, found that the narrowing construction was insufficient to avoid the unconstitutional overbreadth, because the narrowing construction defined "fighting words" to include speech that causes anger, alarm or resentment based on racial, ethnic, gender or religious bias. As Justice White stated, "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected," and since the ordinance, as purportedly narrowly construed, reached that kind of expression, it was "fatally overbroad and invalid on its face." The rationale of Justice White's opinion makes it absolutely clear, as I have contended, that the fighting words exception is extremely narrow and cannot be expanded to include functional equivalents of fighting words or to provide a psychic harm justification for campus bans on racist speech.

The Court majority, however, in an opinion written by Justice Scalia, and joined in by Chief Justice Rehnquist, and Justices Kennedy, Souter and Thomas, went even further. Without considering the effect of the Minnesota Supreme Court's purported narrowing construction of the ordinance, the majority held that the ordinance was unconstitutional because it violated the principle of content neutrality.

pass on the property of the black family—which would not, of course, have raised any First Amendment question—the city chose to prosecute them also under the ordinance, which would apply even if they had burned the cross on their own lawn.

180. See supra note 8 and accompanying text.
182. R.A.V., 60 U.S.L.W. at 4677. In effect, the Minnesota Supreme Court was trying to invoke the "words which by their very utterance inflict injury" part of Chaplinsky, just as the University of Wisconsin did in the UWM Post case. As the district court found in that case and as I have contended, that part of Chaplinsky has never been followed by the Supreme Court. See supra notes 129-43 and accompanying text.
184. Id.
185. See supra notes 124-55 and accompanying text.
Over the strong disagreement of the concurring Justices, the majority held that the principle of content neutrality applied to unprotected speech, such as "fighting words." Since the ordinance, as interpreted, prohibited only a particular category of fighting words—those dealing with race, ethnicity, gender, and religion—while not restricting at all other kinds of fighting words, it violated the principle of content neutrality. As Justice Scalia stated:

Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to none of the specific disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibition on those speakers who express views on disfavored subjects. 186

In this article I stated: "[A]s Doe v. University of Michigan and the UWM Post case make clear, any campus ban on racist speech, no matter how purportedly limited, that reaches the expression of racist ideas violates the First Amendment. Under the principle of content neutrality, a public university cannot ban the expression of racist ideas

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186. R.A.V., 60 U.S.L.W. at 4671. The above discussion refers to a violation of the category aspect of the content neutrality principle. Justice Scalia also said that the ordinance violated the viewpoint neutrality aspect of the principle, since it actually discriminated on the basis of viewpoint, "fighting words" expressing a message of racial tolerance, for example, were not prohibited, while "fighting words" expressing a message of racial hatred were.

One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

Id.

The four concurring Justices strongly disagreed with the majority's position on this issue, saying that the First Amendment permitted content distinctions with respect to unprotected speech, and that, using an equal protection rational basis analysis, the city could conclude that the prohibited kinds of "fighting words" were more harmful than other kinds of "fighting words." As Justice White put it:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil [citing New York v. Ferber, 458 U.S. 747, 763-64 (1982) (child pornography)]; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection. . . . The ordinance proscribes a subset of "fighting words," those that injure "on the basis of race, color, creed, religion or gender." This selective regulation reflects the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable.

Id. at 4674-75.
in any circumstance or for any purpose." In *R.A.V.*, the Supreme Court majority applied the principle of content neutrality to invalidate a ban on racist speech that was limited to unprotected “fighting words.” This being so, it is beyond contravention that the principle of content neutrality protects the expression of racist ideas without qualification, and renders unconstitutional that “narrowest possible” campus ban that would restrict such expression.

*R.A.V.* then sounds the death knell for campus bans on racist speech. As a result of that decision, I am thus more optimistic that “public universities will now decide to turn away from this unconstitutional enterprise and instead direct their efforts to bringing about a meaningful equality of educational opportunity on campus.”

187. *See supra* note 144.

188. *See supra* note 180.